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## Withdrawing from International Custom

**ABSTRACT.** Treaties are negotiated, usually written down, and often subject to cumbersome domestic ratification processes. Nonetheless, nations often have the right to withdraw unilaterally from them. By contrast, the conventional wisdom is that nations never have the legal right to withdraw unilaterally from the unwritten rules of customary international law (CIL), a proposition that we refer to as the “Mandatory View.” It is not obvious, however, why it should be easier to exit from treaties than from CIL, especially given the significant overlap that exists today between the regulatory coverage of treaties and CIL, as well as the frequent use of treaties as evidence of CIL. In this Article, we consider both the intellectual history and functional desirability of the Mandatory View. We find that a number of international law publicists of the eighteenth and nineteenth centuries thought that CIL rules were sometimes subject to unilateral withdrawal, at least if a nation gave notice about its intent. We also find that the Mandatory View did not come to dominate international law commentary until sometime in the twentieth century, and, even then, there were significant uncertainties about how the Mandatory View would work in practice. Moreover, we note that there are reasons to question the normative underpinnings of the shift to the Mandatory View, in that it may have been part of an effort to bind “uncivilized” states to the international law worked out by a small group of Western powers. After reviewing this history, we draw on theories developed with respect to contract law, corporate law, voting rules, and constitutional design to consider whether it is functionally desirable to restrict opt-out rights to the extent envisioned by the Mandatory View. We conclude that, although there are arguments for restricting opt-out in select areas of CIL, it is difficult to justify the Mandatory View as a general account of how CIL should operate.

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## INTRODUCTION

There are two basic types of international law—treaties and customary international law (CIL). Treaties are negotiated, usually written down, and often subject to cumbersome domestic ratification processes. Nonetheless, nations often have the right to withdraw unilaterally from them. Many treaties expressly provide for a right of withdrawal, often with a notice requirement. As Professor Helfer has documented, “Treaty clauses that authorize exit are pervasive.”<sup>1</sup> Indeed, these clauses exist even in treaties that reflect core principles of international public policy, such as the Geneva Conventions and the Nuclear Non-Proliferation Treaty.<sup>2</sup> Moreover, treaties that do not address the issue of withdrawal may be found to allow implicitly for withdrawal, based, for example, on their subject matter.<sup>3</sup> Even when a treaty does not generally permit withdrawal, nations may still have a right to withdraw in the event of a fundamental change of circumstances.<sup>4</sup>

Unlike treaties, the rules of CIL do not arise from express negotiation, and they do not require any domestic act of ratification to become binding. Although these differences might suggest that nations should have greater flexibility to withdraw from rules of CIL than from treaties, the conventional wisdom is precisely the opposite. According to most international law scholars, a nation may have some ability to opt out of a CIL rule by persistent objection to the rule before the time of its formation (although even that proposition is contested), but once the rule becomes established, nations that are subject to it never have the right to withdraw unilaterally from it. Rather, if a nation wants to engage in a practice contrary to an established CIL rule, it must either violate

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1. Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1582 (2005); see also, e.g., ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES* 510 (1961) (noting that the existence of an express treaty termination provision “occurs so frequently that it hardly requires illustration”).
  2. See Treaty on the Non-Proliferation of Nuclear Weapons, art. 10, *done* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (allowing withdrawal after three-months’ notice); Geneva Convention Relative to the Treatment of Prisoners of War, art. 142, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (allowing withdrawal after one year’s notice).
  3. See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 290-91 (2d ed. 2007); see also Vienna Convention on the Law of Treaties, art. 56(1)(b), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (stating that “[a] right of denunciation or withdrawal may be implied by the nature of the treaty”).
  4. See Vienna Convention on the Law of Treaties, *supra* note 3, art. 62, 1155 U.N.T.S. at 347. This basis for withdrawal is a narrow one, and it is thought to be more restricted today than in the past, in part because of the prevalence of clauses either limiting the duration of treaties or expressly allowing for withdrawal. See, e.g., Gab ikovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 7, 61 (Sept. 25); AUST, *supra* note 3, at 297-98.

the rule or enter into a treaty that overrides the rule as between the parties to the treaty. As explained by a committee of experts in its study of CIL for the International Law Association:

There is fairly widespread agreement that, even if there is a persistent objector rule in international law, it applies only when the customary rule is in the process of emerging. It does not, therefore, benefit States which came into existence only after the rule matured, or which became involved in the activity in question only at a later stage. Still less can it be invoked by those who existed at the time and were already engaged in the activity which is the subject of the rule, but failed to object at that stage. In other words, there is no “subsequent objector” rule.<sup>5</sup>

We will refer to this as the “Mandatory View” of CIL.

The contemporary international law literature contains almost no explanation for the Mandatory View. For the most part, the Mandatory View is simply stated as being canonical. It is not obvious, however, why it should be easier to exit from treaties than from CIL, especially given the significant regulatory overlap that exists today between treaties and CIL.<sup>6</sup> Moreover, modern claims about the content of CIL often rely heavily on the content of treaties, especially multilateral treaties, even though many of these same treaties contain withdrawal clauses.<sup>7</sup> There are also functional reasons to doubt the desirability of a mandatory conception of CIL, at least when applied across the board to all CIL issues.<sup>8</sup> In addition, the Mandatory View is in tension with other aspects of CIL doctrine. In particular, if unilateral withdrawal from a CIL rule is so problematic, why are individual nations allowed to opt out of the rule, before it becomes established, through persistent objection? Conversely, if the persistent objector doctrine is needed in order to ensure that CIL is consensual, why does that consent rationale not also require the allowance of opt-out through subsequent objection?

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5. INT’L LAW ASS’N, COMM. ON THE FORMATION OF CUSTOMARY (GEN.) INT’L LAW, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 27 (2000). For similar statements, see, for example, 1 GEORG DAHM, JOST DELBRÜCK & RÜDIGER WOLFRUM, VÖLKERRECHT § 4(II)(2)(a), at 59 (2d ed. 1989); 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, at xxxix (2005); 1 OPPENHEIM’S INTERNATIONAL LAW 15 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); and MALCOLM N. SHAW, INTERNATIONAL LAW 91 (6th ed. 2008).

6. See *infra* text accompanying note 20.

7. See *infra* text accompanying notes 40-41.

8. See *infra* Part IV.

The Mandatory View of CIL, it turns out, was not always as canonical as it is today. Rather, a number of prominent international law publicists of the eighteenth and nineteenth centuries thought that CIL rules were at least sometimes subject to unilateral withdrawal. This was also the view of the early U.S. Supreme Court in some of its most famous CIL decisions. That is, publicists and the Court had in mind what we will call a “Default View” of CIL. Few contemporary scholars appear to be aware of this fact, and not one of the leading treatises or casebooks on international law mentions it. The Mandatory View did not come to dominate international law commentary until sometime in the twentieth century. Even then, there were substantial uncertainties about how the Mandatory View would operate, and CIL evolved in ways that are difficult to explain under that View. Modern commentators, however, invoke the Mandatory View without a sense of its intellectual history and without any effort to explain its justifications.

Furthermore, there are reasons to question the normative underpinnings of the shift in the literature from the Default View to the Mandatory View. This shift appears to have occurred in the late nineteenth and early twentieth centuries, at a time when imperialism was at its height and most of Asia and Africa were under the control of the European powers. The “family of nations” was being expanded, but control over law creation was still largely in the hands of the so-called civilized nations, which meant primarily nations in Western Europe. Viewed in this context, the Mandatory View may have evolved as part of an effort to bind new nations and former colonies to international law rules that had already been worked out by a handful of powerful states.<sup>9</sup> Later, when the new entrants into the system gained strength in numbers and the former powers became concerned that they might lose control of the process of law creation in the international arena, the Mandatory View was modified to allow for opting out of a CIL rule prior to the time that it became established.<sup>10</sup> This right of opt-out, however, was crafted in such a way as to disallow new nations from opting out of any of the CIL rules that had developed before they came into the system. This history sits uneasily with contemporary assumptions in international law about sovereign equality and universality.<sup>11</sup>

This Article considers the intellectual history and functional desirability of the Mandatory View. In Part I, we describe the modern understanding of CIL and explain how the Mandatory View fits within this understanding. In Part II, we document that a number of the leading international law publicists of the

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9. See *infra* text accompanying notes 113–117.

10. See *infra* Section III.B.

11. See *infra* text accompanying note 117.

eighteenth and nineteenth centuries assumed that nations had the right to opt out of at least some CIL rules and that early decisions by the U.S. Supreme Court also reflected this view. In Part III, we trace the intellectual shift in the twentieth century toward the Mandatory View, and we further describe the substantial uncertainties that persisted about how CIL would operate under this View. Finally, in Parts IV and V, we consider the functional desirability of the Mandatory View and conclude that it is difficult to justify that View today—at least for all of CIL. In these parts, we draw on theories developed with respect to contract law, corporate law, voting rules, and constitutional design.

If international law theory made room for some withdrawal rights under CIL, a number of consequences would follow. Nations that found that a CIL rule no longer addressed their needs would have an option other than simply violating it or attempting to bargain around it. Any withdrawal rights would need to be invoked publicly, presumably with reference to the purported CIL rule at issue and also perhaps to the reasons for withdrawal, thereby potentially increasing transparency and dialogue. Such withdrawal rights would also reduce the danger that multilateral treaties could create CIL that, unlike the underlying treaties, would lack an exit option. The potential “sovereignty costs” of establishing and joining such treaties would thereby be lower.<sup>12</sup> At the same time, by allowing for differentiation in withdrawal rights among CIL rules, this approach would allow for the possibility that some CIL rules could be *more* mandatory than under the current one-size-fits-all approach (for example, by disallowing opt-out through prior persistent objection for some CIL rules).

This is an important time to be thinking about CIL theory. The now-widespread use of multilateral treaties as vehicles for international legislation raises questions about what role CIL should play in the international legal system and how this role relates to the one played by treaties. In addition, whereas historic claims about the content of CIL relied heavily on inductions from national practice, many modern claims rely instead on deductions from international pronouncements,<sup>13</sup> a shift that may have implications for a variety of issues, including withdrawal rights. At the same time, there have been increasing challenges to CIL’s legitimacy and effectiveness, with some critics

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12. See *infra* text accompanying note 249.

13. See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757 (2001) (discussing and attempting to reconcile traditional inductive CIL with modern deductive CIL).

arguing that CIL is no longer useful as a body of international law,<sup>14</sup> and others arguing that it does not act as a constraint on national behavior.<sup>15</sup> Unlike these critics, our goal is not to challenge CIL's legitimacy, but rather to understand better how it does and should operate. If CIL theory made more room for a Default View, we believe that it might actually become stronger. In any event, the academic discourse about CIL would benefit from attention to the issue of withdrawal, and we hope that this Article can help initiate that discourse.

## I. MODERN UNDERSTANDING OF CIL

This Part provides background for the rest of the Article, especially for readers who are not international law experts. We summarize here the modern understanding of CIL and some of the debates and uncertainties that surround that understanding, and we explain how the Mandatory View fits with other aspects of CIL doctrine.

Before the twentieth century, CIL was the principal form of international law. It was often referred to as part of the "law of nations," a category that included both public international law (rights and duties between nations) and private international law (rules governing private international relationships and disputes, such as conflict-of-law principles, rules for enforcement of foreign judgments, and the "law merchant").<sup>16</sup> Issues regulated by the public law component of the law of nations included, for example, rights on the seas, conduct during wartime, and diplomatic immunity.

There has since been a proliferation of treaties, both in quantity and range of subject matter, especially after the establishment of the United Nations system at the end of World War II. As a result, most of the major issue areas that were historically covered by CIL are now covered, to one degree or another, by treaties. For example, the Law of the Sea Convention addresses

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14. See, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 452 (2000); see also John O. McGinnis, *The Comparative Disadvantage of Customary International Law*, 30 HARV. J.L. & PUB. POL'Y 7 (2006) (arguing that U.S. law should be preferred over CIL in light of CIL's democratic deficits).

15. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 23-43 (2005).

16. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 822 (1997); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821-22 (1989).

rights on the seas,<sup>17</sup> the Geneva Conventions address conduct during wartime,<sup>18</sup> and the Vienna Convention on Diplomatic Relations addresses diplomatic immunity.<sup>19</sup> Treaties also address numerous issues that were not historically regulated (at least extensively) by international law, including environmental conservation, the protection of human rights, and the prosecution of international crimes. CIL nevertheless continues to play an important role in international law and adjudication, regulating both within the gaps of treaties as well as the conduct of nonparties to the treaties.<sup>20</sup> In addition, some longstanding CIL issues (such as the immunity of heads of state and limits on the extraterritorial application of national law) are still not regulated by any comprehensive treaties. Finally, newly emergent issues will often lack a treaty regime for a time. A possible (although contested) current example is the lack of a treaty addressing the standards for detention and trial of terrorists engaged in an armed conflict with a nation-state.<sup>21</sup>

The standard definition of CIL is that it arises from the practices of nations followed out of a sense of legal obligation.<sup>22</sup> Under this account, there are two elements to CIL: an objective state-practice element and a subjective sense-of-legal-obligation (or *opinio juris*) element. This is the conventional definition, although some commentators have attempted to deemphasize the subjective

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17. U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397.

18. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 2, 6 U.S.T. 3316, 75 U.N.T.S. 135.

19. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

20. See, e.g., BRIAN D. LEPARD, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS* 3-6 (2010); SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 78-86 (2006); Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996).

21. See, e.g., Curtis A. Bradley, *The United States, Israel and Unlawful Combatants*, 12 GREEN BAG 2D 397 (2009); John R. Crook, *State Department Legal Advisor Finds Gaps in Legal Regime for Detention of Transnational Terrorists*, 102 AM. J. INT'L L. 346, 367-70 (2008).

22. See, e.g., Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060 (stating that one of the sources of international law to be applied by the International Court of Justice is "international custom, as evidence of a general practice accepted as law"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (defining CIL as the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation").



element<sup>23</sup> and others have attempted to deemphasize the state-practice element.<sup>24</sup>

Despite general agreement on the definition of CIL, there are many uncertainties surrounding this type of international law. It is not clear how much state practice is required in order to generate a rule of CIL, although most commentators agree that there must be “extensive”<sup>25</sup> or “widespread”<sup>26</sup> practice among the states for which the practice is relevant.<sup>27</sup> Nor is it clear how long nations must engage in the practice before it becomes a rule of CIL. Historically, CIL formation was thought to be an inherently slow process, but technological changes in communication, the rise of international institutions, and other developments are thought to have condensed the time period such that CIL can arise very quickly in some circumstances.<sup>28</sup> Indeed, some commentators argue that there can be “instant” CIL.<sup>29</sup> For these and other reasons, it can be difficult to determine when a CIL rule has developed.

There are also questions about the subjective element of CIL. It is difficult to establish the subjective motivations of nation-states (or, more accurately, their leaders). The reasons that nations give publicly for doing something might not be their true reasons. Moreover, they often act without giving any particular reasons. There is also a circularity problem in requiring that nations act out of a sense of legal obligation before they become bound, since it is not clear how this sense of legal obligation would arise. In addition, some

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23. See, e.g., INT’L LAW ASS’N, *supra* note 5, at 31-32; Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 250 (1999).
  24. Claims about international human rights law, for example, often deemphasize state practice. See Bradley & Goldsmith, *supra* note 16, at 838-42 (describing this “New CIL”). For criticism of this tendency, see Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT’L L. 82 (1989).
  25. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. b (1987).
  26. See, e.g., INT’L LAW ASS’N, *supra* note 5, at 20.
  27. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 7 (7th ed. 2008); MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 29 (rev. 2d ed. 1997).
  28. See, e.g., *N. Sea Continental Shelf* (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 74 (Feb. 20) (noting that “the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule”); KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 59 (2d ed. 1993) (“At present . . . an international custom can arise even in a very short time.”).
  29. See, e.g., Bin Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?*, 5 INDIAN J. INT’L L. 23, 35-40, 45-48 (1965); see also Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 157-59 (2005) (discussing the concept of instant custom).

commentators are skeptical that nations follow practices out of a sense of legal obligation, as opposed to self-interest and coercion.<sup>30</sup> Despite these problems with the subjective element, it might be difficult without that element to distinguish binding custom from practices followed for other reasons, such as habit, policy agreement with the practice, moral commitment, or an applicable treaty.<sup>31</sup>

Once a rule of CIL has formed, the modern understanding is that it is binding on all states except those that have clearly and persistently objected to the rule prior to the time that it has “ripened” or “crystallized.”<sup>32</sup> Persistent objection must involve affirmative international communications, not mere silence or adherence to contrary laws or practices, and there are few examples of agreed-upon successful persistent objection. Moreover, when a new state comes into being, either through decolonization or the breakup of another state, the new state is purportedly bound by all previously ripened rules of CIL, even though the new state did not have an opportunity to object. The complete disallowance of unilateral withdrawal from CIL is what we call the Mandatory View.<sup>33</sup>

It is accepted that a CIL rule can be overridden by a later-in-time treaty, but only as between the parties to the treaty.<sup>34</sup> In that case, the rule continues to bind nonparty states as well as parties in their relations with nonparty states. As a practical matter, therefore, the treaty-override option not only requires

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30. See, e.g., GOLDSMITH & POSNER, *supra* note 15, at 43 (arguing that CIL “is not an exogenous influence on state behavior”).

31. See, e.g., Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT’L L. 143, 178 (2001); see also N. Sea Continental Shelf, 1969 I.C.J. at 44 (“The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.”).

32. See, e.g., GOLDSMITH & POSNER, *supra* note 15, at 23 (“Courts and scholars say that a long-standing practice among states ‘ripens’ or ‘hardens’ into customary international law when it becomes accepted by states as legally binding.”); Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457, 458 (1985) (“A State that fails to object prior to the time that the rule finally crystallizes cannot claim exemption from it . . .”).

33. We are considering here only legal doctrine. In light of the uncertain standards for CIL formation and the frequent lack of adjudicative and enforcement mechanisms for this body of law, it is arguable that nations have some de facto ability to exit from CIL by, for example, contesting the content of the rules. We consider this idea of de facto exit in Section V.B when discussing the rule-of-law argument for the Mandatory View.

34. See, e.g., PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 56 (7th rev. ed. 1997) (“Clearly a treaty, when it first comes into force, overrides customary law as between the parties to the treaty . . .”).

obtaining the agreement of other nations, but also that the CIL obligation be such that a nation can differentiate in its conduct between parties to the treaty and nonparties. This will not be possible for some CIL obligations, such as those that concern the human rights obligations of a nation to its own citizens or the resource or environmental obligations of a nation with respect to something regarded as a global commons (such as the air, the seabed, or outer space).

The only way for nations to change a rule of CIL (as opposed to overriding it by treaty) is to violate the rule and hope that other nations accept the new practice. As one commentator explained with approval, “Nations forge new law by breaking existing law, thereby leading the way for other nations to follow.”<sup>35</sup> Needless to say, there is tension between this idea and the idea of an international rule of law.<sup>36</sup> Unlike for treaties, CIL is not typically described as allowing for withdrawal even when there has been a fundamental change of circumstances.

A small set of international norms, which may or may not be a subset of CIL, has a special status. These norms, referred to as “peremptory norms” or “*jus cogens* norms,” are said to arise from nearly universal practice and to be absolute in their character, such that they do not permit any exceptions—even in times of emergency.<sup>37</sup> Examples purportedly include prohibitions on

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35. Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 21 (1985); see also, e.g., Anthony D'Amato, *The President and International Law: A Missing Dimension*, 81 AM. J. INT'L L. 375, 377 (1987) (“Existing customary law, then, contains the seeds of its own violation; otherwise it could never change itself.”); Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 957 (2005) (“[C]ustomary international law is thought to be altered by acts that initially constitute violations of old rules; that is how it changes.”).
  36. See, e.g., G.J.H. VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 99 (1983) (“It must be quite an extraordinary system of law which incorporates as its main, if not the only, vehicle for change the violation of its own provisions.”); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 8 (1974-75) (“There is no doubt that customary rules can be changed in this way, but the process is hardly one to be recommended by anyone who wishes to strengthen the rule of law in international relations.”). But cf. Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L. 189, 193 (2006) (arguing that “noncompliance—particularly operational noncompliance—is a necessary component of less capable legal systems, including international law”).
  37. See, e.g., Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1987); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331 (2009); see also Vienna Convention on the Law of Treaties, *supra* note 3, art. 53, 1155 U.N.T.S. at 344 (“For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no

genocide, slavery, and torture.<sup>38</sup> *Jus cogens* norms cannot be overridden, even by treaty, and there is no right to opt out of them by prior persistent objection.<sup>39</sup> The only way in which these norms can be changed is through the development of a new conflicting *jus cogens* norm—something that is unlikely to occur.

There is significant debate about the materials that are relevant in discerning the existence of a CIL (or *jus cogens*) rule. For example, although treaty and CIL obligations frequently overlap, there is debate over whether and to what extent treaties can serve as evidence of CIL.<sup>40</sup> Nevertheless, claims about the content of CIL often rely heavily on the content of treaties.<sup>41</sup> There is also debate over whether and to what extent nonbinding resolutions promulgated by international bodies, such as the U.N. General Assembly (in which each nation has one vote), have evidentiary value.<sup>42</sup> In practice, due to resource, expertise, and other constraints, few adjudicatory bodies conduct anything like a 192-nation survey of state practice in deciding whether to recognize and apply a rule of CIL. It is also common in academic commentary to see claims about the content of CIL that are not based on empirical evidence of state practices.<sup>43</sup>

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derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

38. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987).
39. See, e.g., *id.* § 102 cmt. k; Holning Lau, Comment, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT’L L. 495, 498 (2005).
40. See, e.g., Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971 (1986); Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT’L L. & POL’Y 71 (1996); Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT’L L. 1 (1988).
41. See, e.g., GOLDSMITH & POSNER, *supra* note 15, at 23 (“Treaties, especially multilateral treaties, but also bilateral ones, are often used as evidence of customary international law, but in an inconsistent way.”); R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT’L L. 275, 275 (1965-66) (“Both multilateral and bilateral treaties are not infrequently cited as evidence of the state of customary international law.”).
42. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 85 (1991); see also, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 254-55 (July 8) (“[General Assembly resolutions] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.”).
43. See, e.g., Jack L. Goldsmith, Panel Discussion, *Scholars in the Construction and Critique of International Law*, 94 AM. SOC’Y INT’L L. PROC. 317, 318 (2000).

Running through all these uncertainties and debates surrounding CIL are questions about whether it can or should be grounded in state consent.<sup>44</sup> In an international system that lacks a central sovereign government, some commentators argue that the consent of nation-states is a prerequisite for the binding force of international law.<sup>45</sup> Other commentators dismiss consent as the touchstone for the legitimacy of CIL, noting (among other things) that it is difficult to reconcile the modern understanding of CIL with any meaningful conception of state consent.<sup>46</sup>

Whatever the proper role of consent in international law, CIL (as it is currently conceived) is less consensual than treaty-based law. Treaties bind only nations that have affirmatively ratified them, and, as discussed, nations often have the ability to withdraw from treaties, albeit sometimes with a notice requirement.<sup>47</sup> CIL, by contrast, binds new states regardless of their consent and binds existing states based merely on their silence. There is also no unilateral right of withdrawal. *Jus cogens* norms are even less consensual.

In the United States, debates about CIL intersect with debates over its domestic status. Even though treaties are expressly negotiated and must receive the approval of the President and a supermajority of the Senate, many of them are not “self-executing” and thus can be enforced in U.S. courts only if they are implemented by legislation enacted by Congress.<sup>48</sup> By contrast, even though CIL engages much less with U.S. democratic processes than do treaties, many international law commentators claim that CIL is automatically self-executing federal law that (among other things) preempts inconsistent state law.<sup>49</sup> In

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44. See, e.g., Kelly, *supra* note 14, at 473-75, 508-24 (discussing problems with consent-based accounts of CIL).

45. See, e.g., LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 27 (1995); MARK WESTON JANIS, *INTERNATIONAL LAW* 44 (5th ed. 2008); see also *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7) (“The rules of law binding upon States therefore emanate from their own free will . . .”).

46. See, e.g., J.L. BRIERLY, *THE LAW OF NATIONS* 51-54 (6th ed. 1963); Kelly, *supra* note 14, at 508-16.

47. See *supra* text accompanying notes 1-2. Furthermore, when nations ratify a treaty they often have the right to opt out of particular provisions in the treaty through the attachment of reservations to their ratifications. See AUST, *supra* note 3, 100-30.

48. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 506-19 (2008) (discussing considerations relevant to determining whether a treaty provision is self-executing); Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131 (same).

49. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111 cmt. d, 115 cmt. e (1987); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295, 303-04, 332 n.109; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984); Harold

support of this proposition, these commentators often rely on nineteenth-century and early twentieth-century statements that the law of nations is “part of our law.”<sup>50</sup> Debates over CIL also arise in connection with international human rights litigation brought in U.S. courts, especially litigation brought under the Alien Tort Statute, in which foreign citizens sue foreign government officials and other defendants for alleged violations of the CIL of human rights.<sup>51</sup>

This Article focuses on the legal authority of nations to withdraw from rules of CIL. The issue of withdrawal is hardly the only theoretical puzzle surrounding CIL. Professor D’Amato observed in his 1971 book on CIL that “[t]he questions of how custom comes into being and how it can be changed or modified are wrapped in mystery and illogic.”<sup>52</sup> More recently, Professor Guzman noted that “CIL has no coherent or agreed upon theory to justify its role or explain its doctrine.”<sup>53</sup> The Mandatory View of CIL is particularly worthy of study, however, because unlike the other puzzles it has gone largely unexamined and sits so incongruously with the widespread exit rights available under treaties.

## II. HISTORICAL SUPPORT FOR A DEFAULT VIEW OF CIL

The Mandatory View of CIL was not always the canonical view. Rather, a number of prominent international law publicists of the eighteenth and nineteenth centuries thought that CIL rules were at least sometimes subject to unilateral withdrawal. This was also the view of the early U.S. Supreme Court in some of its most famous CIL decisions. CIL was, in other words, viewed in some instances as merely a default—that is, it was viewed as binding only until

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Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1846-47 (1998).

50. See, e.g., Koh, *supra* note 49, at 1831; Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2255-57 (2004).
51. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (allowing claims to be brought under the Alien Tort Statute based on CIL norms that are specifically defined and widely accepted); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (allowing Paraguayan citizens to sue a former Paraguayan police inspector under the Alien Tort Statute for torture committed in Paraguay).
52. ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 4 (1971).
53. Guzman, *supra* note 29, at 117. For similar observations, see, for example, MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 409 (1989); Kelly, *supra* note 14, at 516; and Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 563 (2002).

such time as a nation adequately announced that it no longer intended to continue adhering to the rule. Sometimes a period of notice might be required to protect reliance interests, but otherwise there was a right of unilateral withdrawal. We call this the “Default View” of CIL. To be clear, we are not claiming that the Default View was necessarily the only perspective. Rather, our claim is simply that the Mandatory View was not always the exclusive view of CIL and that there was at least some support historically for an alternate view that would allow for greater exit rights. This alternate view is not mentioned in any of the modern treatises or casebooks on international law.<sup>54</sup>

Consider first the classic international law publicists. Despite the influence of natural law theory during the eighteenth century (which, if anything, would be expected to lead to a less flexible view of CIL), many of the international law treatise-writers of that period did not subscribe to the Mandatory View of CIL. The influential eighteenth-century Swiss commentator, Emmerich de Vattel, described the “customary law of nations” as follows:

When a custom or usage has become generally established either between all the civilized countries of the world or only between those of a given continent, Europe for example, or those which have more frequent intercourse with one another, if this custom be indifferent in nature, much more so if it be useful and reasonable, it becomes binding upon all those nations which are regarded as having given their consent to it. They are bound to observe it towards one another, *so long as they have not expressly declared their unwillingness to follow it any longer*.<sup>55</sup>

Vattel elaborated on this point when discussing ambassadorial privileges and immunities, and here it is worth quoting him at length:

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54. Professor Dodge discusses some of this history in the context of considering the relationship, in U.S. domestic law, between treaties and CIL. See William S. Dodge, *Customary International Law in U.S. Courts: Origins of the Later-in-Time Rule*, in MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 531 (Pieter H.F. Bekker, Rudolf Dolzer & Michael Waibel eds., forthcoming 2010) (on file with authors). There is also a brief reference to what we are calling the Default View in an article by Professor Kelly. See Kelly, *supra* note 14, at 509-10.
55. EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS*, intro., § 26, at 9 (photo. reprint 1993) (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758) (emphasis added). Vattel was influenced by the work of Christian Wolff, a German philosopher, who described the customary law of nations as resting “upon the tacit consent of nations.” 2 CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* 18-19 (Joseph H. Drake trans., Clarendon Press 1934) (1749).

Let us examine . . . what obligation custom or received usage can impose upon Nations, not only in matters relating to ministers, but also in other matters in general. No usages or customs of other Nations can bind an independent State, except in so far as that State has given its express or implied consent to them. But when a custom, indifferent in itself, has been once established and received, it is binding upon Nations which have expressly or tacitly adopted it. However, if any of them happens to find at a later time that the custom is disadvantageous, it is free to declare that it is unwilling to abide by such a custom; and once it has clearly made known its intention there is no room for complaint on the part of others if it does not observe the custom. But such an intention should be known in advance, at a time when no particular Nation will be affected by the new rule; it is too late to make the change when a case in point has already arisen.<sup>56</sup>

Thus, according to Vattel, a customary rule of international law was binding on nations that had tacitly accepted it, but these nations nevertheless had an ability to opt out of the rule if they later found it to be disadvantageous, so long as they gave advance notice of their intention. Other classic European international law publicists, such as Jean-Jacques Burlamaqui, Cornelius Bynkershoek, and Georg von Martens, expressed the same basic idea.<sup>57</sup>

To be sure, Vattel did not think that nations had the right to withdraw from all international law rules. In addition to treaties and custom, Vattel referred to a category of international law that he termed the “voluntary” law of

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56. VATTEL, *supra* note 55, bk. IV, § 106, at 385-86.

57. See, e.g., J.J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL LAW IN WHICH THE TRUE SYSTEMS OF MORALITY AND CIVIL GOVERNMENT ARE ESTABLISHED* 199 (Nugent trans., Dublin, John Rice 1791) (1718) (“There is, besides, another law of nations, which we may call arbitrary and free, as founded only on an express or tacit convention; the effect of which is not by itself universal; being obligatory only in regard to those who have voluntarily submitted thereto, and only as long as they please, because they are always at liberty to change or repeal it.”); CORNELIUS VAN BYNKERSHOEK, *DE FORO LEGATORUM LIBER SINGULARIS: A MONOGRAPH ON THE JURISDICTION OVER AMBASSADORS IN BOTH CIVIL AND CRIMINAL CASES*, ch. XIX, at 106-07 (photo. reprint 1995) (Gordon J. Laing trans., William S. Hein & Co. 1946) (1744) (“The law of nations is nothing but a presumption based on custom, nor has this presumption any validity in the face of a definitely expressed wish on the part of him who is concerned.”); G.F. VON MARTENS, *A COMPENDIUM OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE* 356 (William Cobbett trans., London, Cobbett & Morgan 1802) (1788) (“As to rights founded on simple custom, each power may discontinue them whenever it makes a timely declaration, either express or tacit of its intention so to do.”). For more on Bynkershoek, see *infra* note 161.



nations.<sup>58</sup> Although Vattel described this category as stemming from the presumed consent of nations (hence the term voluntary), he did not suggest that nations could unilaterally withdraw their consent.<sup>59</sup> For this voluntary law-of-nations category, Vattel had in mind the protection of what he called the “perfect rights” of nations, which included rights of security and governance.<sup>60</sup> Vattel noted, however, that “care must be taken not to extend these rights so as to prejudice the liberty of Nations.”<sup>61</sup>

The key point for present purposes is that Vattel and other classic publicists thought that nations could withdraw from at least some CIL rules. This proposition was repeated and endorsed in numerous nineteenth-century international law treatises, in both the United States and Great Britain, sometimes with the observation that notice may in some instances be required prior to withdrawal from a CIL rule. For example, the American publicist Henry Wheaton, writing in 1845, endorsed the view of Bynkershoek that “[t]he law of nations is only a presumption founded upon usage; and every such presumption ceases the moment the will of the party is declared to the contrary.”<sup>62</sup> As a result, Wheaton argued that a nation could decline to give the diplomatic immunity accorded by the law of nations, “provided it openly declares its intention so to act.”<sup>63</sup> Similarly, in his commentary on Vattel published in 1856, the British barrister Joseph Chitty added the following footnote to Vattel’s statement concerning a right to withdraw from a customary rule: “There must be a reasonable notification, in point of time, of

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58. See VATTEL, *supra* note 55, intro., § 21, at 8.

59. See *id.* Vattel explained that even if nations did not actually consent to the voluntary law of nations, natural law would effectively supply their consent, and that “the Nation which would refuse to consent would violate the common rights of all Nations.” *Id.*, bk. III, § 192, at 306.

60. See *id.*, intro., § 17, at 7. Breaches of perfect rights were subject to sanction by other nations, including through the use of military force. *Id.* § 22, at 8. A right that would otherwise be imperfect could become perfect through a treaty or through custom, but such a perfected right would be subject to the limitations inherent in treaties and custom, including the right to opt out of custom. *Id.* §§ 24-26, at 8-9.

61. *Id.* § 23, at 8. Vattel also referred to the “necessary” law of nations, which consisted of principles derived from natural law. But he viewed this category as binding on nations only as a matter of their internal conscience, not as a matter of external law. See *id.* § 28, at 9.

62. HENRY WHEATON, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA 196 (New York, Gould Books & Co. 1845); see also *id.* at 96.

63. *Id.* at 195.

the intention not to be bound by the customary law.”<sup>64</sup> In 1861, Henry Halleck, a U.S. Army general and accomplished lawyer, recited Vattel’s proposition about withdrawal and noted that “[c]ustoms which are lawful and innocent are binding *upon the states which have adopted them*,” while also emphasizing that the right to withdraw from a CIL rule did not apply to “what [Vattel] calls the voluntary law of nations, which is founded on general usage or implied consent.”<sup>65</sup> Similar suggestions of at least a qualified opt-out right under CIL appear in other treatises up through the end of the nineteenth century.<sup>66</sup> Modern commentators, while often paying homage to the views of these publicists in other ways, seem to be unaware of these statements.<sup>67</sup>

Early U.S. Supreme Court decisions also envisioned that CIL rules were binding only on nations that continued to accept them.<sup>68</sup> Take, for example,

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- 64. EMMERICH DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS*, preliminaries, § 26, at lxvi n.9 (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson & Co. 1856) (1758).
  - 65. H.W. HALLECK, *INTERNATIONAL LAW; OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR* 48-49 (San Francisco, H.H. Bancroft & Co. 1861) (emphasis added). Subsequent editions of Halleck’s treatise, revised and edited by Sherston Baker, including the fourth edition published in 1908, contained similar language. See 1 HALLECK’S *INTERNATIONAL LAW* 55-56 (G. Sherston Baker ed., 4th ed., 1908).
  - 66. See, e.g., SHERSTON BAKER, *FIRST STEPS IN INTERNATIONAL LAW* §6, at 16 (London, Kagan Paul, Trench, Trübner & Co. 1899) (“Customs which are lawful and innocent are binding *upon the States which have adopted them . . .*”) (emphasis added); 1 ROBERT PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW* 39 (London, Butterworths 3d ed. 1879) (stating that nations should not “lightly depart[.]” from customary rules and “never without due notice conveyed to other countries”); ARCHER POLSON, *PRINCIPLES OF THE LAW OF NATIONS* 12 (Philadelphia, T. & J.W. Johnson & Co. 1860) (“It is competent to any nation, that so pleases it, to renounce any of her customs, and so to exempt herself from the jurisdiction of such portions of the law of nations as those customs warrant . . .”). The treatises were not perfectly uniform on this point. For a suggestion in the late 1880s of something like the Mandatory View, see WILLIAM EDWARD HALL, *INTERNATIONAL LAW* 12 (Oxford, Clarendon Press 1880), which states that the United States could eventually become bound, even without its consent, to the abolition of privateering in the Declaration of Paris, as a result of the “persistent opinions” of other states.
  - 67. See, e.g., Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 484-85 (1989) (relying on Vattel); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 401 (1997) (same).
  - 68. Vattel’s treatise was very influential in early U.S. history and was frequently relied upon by the Supreme Court. See DANIEL GEORGE LANG, *FOREIGN POLICY IN THE EARLY REPUBLIC: THE LAW OF NATIONS AND THE BALANCE OF POWER* 13-33 (1985); Charles G. Fenwick, *The Authority of Vattel*, 7 AM. POL. SCI. REV. 395 (1913); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1061-67 (2002).

the Court's first significant foreign relations law decision, *Ware v. Hylton*, in which the Court considered the propriety of the state of Virginia's confiscation during the Revolutionary War of debts owed to British creditors.<sup>69</sup> While ultimately concluding that the confiscation violated the 1783 peace treaty with Great Britain, the Court held that there was no basis for undoing the seizure based on CIL. At that time, the Supreme Court Justices wrote their opinions seriatim, and Justice Chase, writing the most extensive opinion, explained that although European nations had adopted a custom disallowing the confiscation of debts owed to enemy aliens, the state of Virginia was free to pursue a different practice. Justice Chase noted that there were three types of law of nations rules: general, conventional, and customary. The customary law of nations, Justice Chase said, "is founded on tacit consent; and is only obligatory on those nations, who have adopted it."<sup>70</sup> As a result, he concluded that the customary restriction on confiscating private debts followed by European nations "was not binding on the state of *Virginia*, because founded on *custom only*; and she was at liberty to reject, or adopt the *custom*, as she pleased."<sup>71</sup> Similarly, one of the lawyers for the Virginia debtors, citing Vattel, emphasized that "the conventional, or customary, law of nations is only obligatory on those nations by whom it is adopted."<sup>72</sup>

Consider also the Court's 1812 decision in *Schooner Exchange v. McFaddon*.<sup>73</sup> In that case, the Court, in an opinion authored by Chief Justice Marshall, held

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69. 3 U.S. (3 Dall.) 199 (1796).

70. *Id.* at 227 (opinion of Chase, J.).

71. *Id.* In theory this statement would also be consistent with a narrower opt-out right that would apply only to new states, but we have not found any support in the literature of that period for limiting the opt-out right in that manner. Justice Iredell suggested a different reason why the purported customary rule against seizing enemy property did not apply to the conflict with Great Britain: the fact that Great Britain did not recognize the United States as a sovereign entity and "sought to destroy their very existence as an independent people." *Id.* at 263 (opinion of Iredell, J.).

72. *Id.* at 215 (opinion of Chase, J.). Support for an opt-out right from the customary law of nations can also be found in *Rutgers v. Waddington*, an important preconstitutional decision by the Mayor's Court in New York, in which Alexander Hamilton represented a British defendant in a trespass case relating to the occupation of a business establishment in New York during the Revolutionary War. In addressing the defendant's argument that the application of the New York trespass statute to this situation would violate international law, the court rejected the claim that nations are always disallowed from opting out of CIL: "[W]hen this doctrine is applied in general to all customs, which prevail by *tacit consent* as part of the law of nations; we do not find that [it] is warranted by authorities." SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY, 1674-1784, at 315 (Richard B. Morris ed., 1935).

73. 11 U.S. (7 Cranch) 116 (1812).

that private individuals could not (in effect) sue France to recover a vessel that they said had been unlawfully taken by France during wartime.<sup>74</sup> In concluding that the suit was barred by sovereign immunity, the Court did not say that the United States was disallowed from withdrawing from CIL rules of sovereign immunity. Instead, the Court, in language that most commentators have passed over, explained that the CIL sovereign immunity rules applied to the United States because it had not announced before receiving the ship in question that it disagreed with the CIL rules: “A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should *suddenly and without previous notice*, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.”<sup>75</sup> Because of the lack of such notice, reasoned the Court, the United States had implicitly given France a promise that the usual CIL rules would apply:

[T]he Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, *under an implied promise*, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.<sup>76</sup>

The Court’s statements were consistent with the arguments of the federal government attorney who appeared in the case to argue for France’s immunity. This attorney, Alexander Dallas, who had previously served as the first reporter of decisions for the Supreme Court, acknowledged that a nation could “change the public law as to foreign nations, upon giving notice” and that consent of a foreign nation to be sued could be inferred where a domestic law “previously

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74. As a “libel” action in admiralty, the case was technically brought against the vessel rather than the nation of France.

75. 11 U.S. at 137 (emphasis added).

76. *Id.* at 147 (emphasis added); *see also id.* at 141 (“If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.”).

provides and changes the law of nations.”<sup>77</sup> Subsequent sovereign immunity decisions from the early 1800s contain similar reasoning.<sup>78</sup>

The Supreme Court’s default conception of CIL has a potential connection to U.S. separation-of-powers considerations, and thus to controversies surrounding the status of CIL within the U.S. legal system.<sup>79</sup> This potential connection is illustrated by another seizure of enemy property decision—this time from the War of 1812. In *Brown v. United States*, the Court considered whether the executive branch had the authority to seize property in the United States owned by British citizens.<sup>80</sup> In concluding that it did not, the Court, citing Vattel and other international law commentators, noted that “[t]he modern rule then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property.”<sup>81</sup> Although the Court acknowledged that the United States had the ability to opt out of this custom, it reasoned that this opt-out decision should be made specifically by Congress, which could take into account the reciprocity implications:

The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department *which can modify it at will*; not for the consideration of a department which can pursue only

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77. *Id.* at 123.

78. See, e.g., *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352–54 (1822) (citing *Schooner Exchange* for the proposition that the exemption of foreign state vessels from a nation’s jurisdiction “stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations [and that] as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence”). Even with respect to the highly normative issue of the slave trade, the Marshall Court concluded that nations could not be bound against their will to evolving norms against the trade. See *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) (“As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it.”).

79. For a description of these controversies, see Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 881–91 (2007).

80. See 12 U.S. (8 Cranch) 110 (1814).

81. *Id.* at 125. Vattel explained that citizens of the enemy state who had come into the host state before the initiation of the war would have done so “in reliance upon the public faith,” with the host state having “impliedly promised them full liberty and security for their return home.” VATTEL, *supra* note 55, bk. III, § 63, at 256.

the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.<sup>82</sup>

As Professors Bellia and Clark have explained, this decision is part of a larger pattern of U.S. decisions in which the domestic application of CIL has historically been tied to separation-of-powers considerations.<sup>83</sup> What even Professors Bellia and Clark fail to notice, however, is that the decision concerns not merely the allocation of authority to *implement* a CIL rule, but also the allocation of authority to *opt out* of a CIL rule.<sup>84</sup>

The opt-out idea may also help explain other important Supreme Court decisions concerning CIL. Indeed, it arguably sheds light on what is perhaps the Court's most famous decision applying CIL, *The Paquete Habana* decision in 1900.<sup>85</sup> In that case, the Court concluded that there was a CIL rule barring the seizure of unarmed coastal fishing vessels during wartime, and it ordered the U.S. Navy to pay compensation for seizing and selling two such vessels during the Spanish-American War. In an oft-quoted sentence, the Court observed that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."<sup>86</sup> The Court also made clear, however, that it should apply the "customs and usages of civilized nations" only "where there is no treaty, and no controlling executive or legislative act or judicial decision."<sup>87</sup>

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82. 12 U.S. at 128-29 (emphasis added). Importantly, Marshall did not say that a deviation from the customary rule by Congress would place the United States in breach of international law. Instead, he said that it was likely to result in the adoption of a similar practice by the other nation and thus raise policy concerns best addressed by the legislature. In dissent, Justice Story argued that there was in fact no customary rule prohibiting the seizure of enemy property. *See id.* at 145-46 (Story, J., dissenting).

83. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 70-72 (2009).

84. In 1795, when defending a provision in the Jay Treaty with Great Britain that prohibited the confiscation of enemy property and debts, Alexander Hamilton had argued that the United States was already bound by a CIL rule to the same effect because, "when [it was] a member of the British Empire, [it was] a party to that law, and not having dissented from it when they became independent they are to be considered as *having continued a party to it*." ALEXANDER HAMILTON, *To Defence No. XX* (Oct. 23-24, 1795), in 19 THE PAPERS OF ALEXANDER HAMILTON 341 (Harold C. Syrett ed., 1973) (emphasis added).

85. 175 U.S. 677 (1900).

86. *Id.* at 700.

87. *Id.*

The qualifying language in *The Paquete Habana* has long divided and puzzled commentators.<sup>88</sup> This language is generally interpreted as referring to the domestic institutions that can *violate* CIL on behalf of the United States. While that might be what the Court had in mind, it is not clear from that explanation why the Court indicated that CIL should not be applied in the face of domestic judicial precedent to the contrary. Even the reference to a controlling executive act raises questions, since it is often assumed that only Congress, not the executive, has the authority to override treaties for the United States.<sup>89</sup>

A possible explanation for this qualifying language in *The Paquete Habana* is that the Court viewed the CIL rule in question as binding on the United States only to the extent that the country had not opted out of it, and the Court thought that for that particular CIL rule, any of the three branches of the federal government would have the authority to make the opt-out decision. The U.S. government had argued that the decision whether to exempt fishing vessels from seizure was discretionary with the executive, and that such an exemption would require either a treaty “or some specific ordinance or proclamation by which the executive shows an exercise of discretion in favor of the property claimed to be exempted.”<sup>90</sup> The Court appears to have in effect reversed this proposed presumption, concluding that the vessels were immune absent some treaty or unilateral public act to the contrary.

Importantly, the Court in *The Paquete Habana* expressly tied its holding back to the separation-of-powers analysis in *Brown* (a decision in which, as noted, the Court assumed a U.S. ability to opt out of the custom):

The decision [in *Brown*] that enemy property on land, which by the modern usage of nations is not subject to capture as prize of war, cannot be condemned by a prize court, even by direction of the executive, without express authority from Congress, appears to us to repel any inference that coast fishing vessels, which are exempt by the general consent of civilized nations from capture, and which no act of Congress or order of the President has expressly authorized to be taken

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88. See, e.g., Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 324 (1985) (noting that “*The Paquete Habana* has generated extensive disagreement as to whether the President may violate international law”); Louis Henkin, *The President and International Law*, 80 AM. J. INT’L L. 930, 931 (1986) (noting that “[w]e can only speculate as to what the Court meant”).

89. See, e.g., Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 154-69 (2004).

90. Brief for the United States at 11, *The Paquete Habana*, 175 U.S. 677 (No. 395).

and confiscated, must be condemned by a prize court, *for want of a distinct exemption in a treaty or other public act of the Government*.<sup>91</sup>

The Court thus seems to be equating an opt-out pursuant to a unilateral public act of the government with an “exemption” authorized by a treaty. This opt-out possibility may also explain why the Court went out of its way in *The Paquete Habana* to make clear that the United States had accepted the CIL rule exempting coastal fishing boats from capture, both historically and during the war in question.<sup>92</sup> The claimants had also emphasized this point at the beginning of the argument section of their brief.<sup>93</sup> To be clear, we are not arguing that this is the only possible reading of the decision—just that it is an available reading that becomes apparent when one understands the Default View that was common in the nineteenth century. As far as we are aware, no other commentator has noticed this possible reading of *The Paquete Habana*.<sup>94</sup>

In sum, contrary to what most commentators assume, the Mandatory View of CIL has not always been the canonical view, at least as an account of how all of CIL operates. Many leading eighteenth- and nineteenth-century publicists

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91. 175 U.S. at 711 (emphasis added). The Court also relied on Wheaton’s international law treatise, which endorses the Default View. *See id.* at 700-01; *see also supra* notes 62-63 and accompanying text.

92. *See id.* at 696-99 (documenting U.S. acceptance of the rule during the Mexican-American War); *id.* at 712-14 (documenting President McKinley’s desire to conduct the Spanish-American War consistent with established principles of CIL); *see also* *The Lottawanna*, 88 U.S. 558, 572 (1874) (explaining that maritime law “is only so far operative as law in any country as it is adopted by the laws and usages of that country” and that “[i]n this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such”).

93. *See* Brief for Claimants, Appellants at 7, *The Paquete Habana*, 175 U.S. 677 (No. 395) (“In short, the United States publicly declared that its policy was in full accord with the principles of modern international law.”); *see also id.* at 35 (“There is nothing in the records to suggest that the boats or their crews were in any respect different from those as to which a well-defined practice exists, and the President having especially invoked such practice for the guidance of all persons, including the courts, the vessels should receive the immunity it affords.”).

94. Professor Dodge claims that, by the time of *The Paquete Habana* decision, there had already been a shift to what we are calling the Mandatory View. *See* Dodge, *supra* note 54, at 555. Dodge does not offer direct evidence to support this conclusion. He notes that there is a reference in *The Paquete Habana* to the “general consent of the civilized nations,” *id.* (quoting 175 U.S. at 708), but similar language had appeared in earlier decisions when there was still support in the literature for a Default View of at least some of CIL. *See, e.g.,* *The Scotia*, 81 U.S. 170, 187 (1871) (“Like all the laws of nations, [the law of the sea] rests upon the common consent of civilized communities.”).



did not subscribe to it. Nor did the U.S. Supreme Court in some of its most famous nineteenth-century CIL decisions.

That said, a couple of caveats are in order. First, although we rely on treatises from Europe, the judicial precedent that we describe is drawn from the United States. Hence, it is possible that the Default View was accepted more in the United States than elsewhere. Even assuming that this turned out to be the case, it would still show that the Mandatory View was not as uniformly accepted in the eighteenth and nineteenth centuries as it is today. A second caveat is that the history recounted does not, by itself, dictate any particular conclusions about how CIL should operate in the modern era. Our claim about its relevance is simply that it shows that the Mandatory View is not the only possible approach to CIL, and that an international legal system could potentially operate despite the allowance of some CIL withdrawal rights. In any event, only by having a sense of this history can one begin to consider why the Mandatory View eventually became conventional wisdom, an issue to which we now turn.

### III. SHIFT TO THE MANDATORY VIEW

At some point, the Mandatory View became conventional wisdom. In 1969, the International Court of Justice (ICJ) stated in its *North Sea Continental Shelf* decision that “customary law rules . . . must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.”<sup>95</sup> More recently, there has been almost unquestioning acceptance of the Mandatory View. Writing in 1985, for example, Professor Charney asserted that “[n]o authority would permit a State unilaterally to opt out of an existing rule of customary international law.”<sup>96</sup> In this Part, we attempt to identify the reasons for this shift, and we consider the relationship between this shift and the modern persistent objector doctrine.

#### A. *Timing of and Reasons for the Shift*

It is difficult to know precisely when the shift to the Mandatory View occurred. It appears that there was increasing support in the treatises for this view near the end of the nineteenth century. For example, the British lawyer, John Westlake, stated in 1894 that:

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95. *N. Sea Continental Shelf* (F.R.G./Den., F.R.G./Neth.) 1969 I.C.J. 3, 38-39 (Feb. 20).

96. Charney, *supra* note 35, at 2.

The consent of the international society to the rules prevailing in it is the consent of the men who are the ultimate members of that society. When one of those rules is invoked against a state, it is not necessary to show that the state in question has assented to the rule either diplomatically or by having acted on it, though it is a strong argument if you can do so. It is enough to show that the general *consensus* of opinion within the limits of European civilisation is in favour of the rule.<sup>97</sup>

A more significant endorsement of the Mandatory View came eleven years later, in Lassa Oppenheim's famous and influential treatise. Oppenheim stated:

[N]o State which is a member of the Family of Nations can at some time or another declare that it will in future no longer submit to a certain recognised rule of the Law of Nations. The body of the rules of this law can be altered by common consent only, not by a unilateral declaration on the part of one State.<sup>98</sup>

Oppenheim cited nothing in support of this statement, so it is unclear whether or to what extent he thought the proposition was settled. The same year that his treatise was published, a British court suggested that at least some rules of CIL had to be accepted by Britain before they would be binding. In a case involving a claim that, after its takeover of the South African Republic, Britain was obligated to honor the private contractual obligations of the prior government, the court reasoned that in order for there to be "satisfactory evidence" of a CIL rule binding on Britain, there would need to be a showing "that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it."<sup>99</sup>

Absent other evidence, the date of the publication of Oppenheim's treatise – 1905 – might seem like a reasonable date for marking the shift in the

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97. JOHN WESTLAKE, *CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW* 78 (1894).

98. 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 18 (1905). Oppenheim was a German scholar who taught in England, first at the London School of Economics and then at the University of Cambridge. See Charles Noble Gregory, In Memoriam, *Professor Oppenheim*, 14 AM. J. INT'L L. 229 (1920).

99. *W. Rand Cent. Gold Mining Co. v. The King*, [1905] 2 K.B. 391 at 407. For an earlier British decision with similar reasoning, see *R v. Keyn*, [1876] 2 Exch. Div. 63, 202 (Lord Cockburn C.J.) ("To be binding, the law must have received the assent of the nations who are to be bound by it.").

literature toward the Mandatory View. On the other hand, there are reasons to believe that the shift may have occurred later. For example, statements by the delegates at various diplomatic conferences, such as at the Hague Codification Conference of 1930, suggest that at least some nations continued to support the Default View.<sup>100</sup> In addition, well after the publication of Oppenheim's treatise, there continued to be substantial support in the literature for a "voluntarist" conception of international law.<sup>101</sup> Under that conception, international law could only bind states if they had expressly or implicitly agreed with it, a proposition that is not readily compatible with the Mandatory View.<sup>102</sup> It is not clear precisely when the voluntarist conception was replaced (if it ever was), although some commentators suggest that this happened by the end of World War II.<sup>103</sup> Even after World War II, Soviet commentators advocated the voluntarist conception, and, relatedly, a Default View of CIL.<sup>104</sup> Voluntarism was also advocated in the post-World War II period by newly independent states.<sup>105</sup> Moreover, as Professor Schachter has noted, even though Western states were "more ambivalent [about voluntarism] . . .

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100. See O.A. ELIAS & C.L. LIM, *THE PARADOX OF CONSENSUALISM IN INTERNATIONAL LAW* 97-98 (1998) (quoting, for example, the Romanian delegate as stating that "[e]ach State reserves to itself the right to recognize or not to recognize the whole or part of international custom").

101. See, e.g., 1 CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 5 (1922) ("On principle, therefore, changes in the law of nations require the consent of the States affected thereby."); VILLIGER, *supra* note 27, at 41-42.

102. See, e.g., Michael J. Glennon, *Sometimes a Great Notion*, 27 WILSON Q. 45, 46 (2003) ("It's sometimes claimed that this right of rejection exists only when a rule is first proposed, while it is in an inchoate state. But the whole logic of voluntarism undercuts this contention . . ."); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 299 (2006) ("A strictly voluntarist view of international law rejects the notion that a state may be bound by an international legal rule without its consent and thus does not recognize a collective interest that is capable of overriding the will of an individual member of the society."); Brigitte Stern, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT'L L. 89, 98 (2001) ("Within the framework of a strict voluntarism, it is unreasonable to claim that once custom has been formed it must govern all the states that are part of the international community, independently of their will.").

103. See, e.g., JERZY MAKARCZYK, *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 124 (1996) ("Voluntarism was still the leading teaching in the period between the two world wars.").

104. See, e.g., G.I. Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 CALIF. L. REV. 419, 427-28 (1961). In fact, it appears that post-Soviet scholars in Russia continued to adhere to the voluntarist view. See TARJA LÄNGSTRÖM, *TRANSFORMATION IN RUSSIA AND INTERNATIONAL LAW* 177 (2003).

105. See SCHACHTER, *supra* note 42, at 10.

virtually all of them have asserted at some time or other that they were not bound by international rules which they had not accepted.”<sup>106</sup>

Regardless of the precise timing, it is clear that at least the initial stages of a shift in the literature had begun to occur by the early twentieth century. We have found two suggestions about why this happened, one of which we think is implausible, and the other of which we think is plausible but normatively unattractive.

Professor Dodge describes the shift as occurring at the same time as the shift from natural law to positivism.<sup>107</sup> He does not necessarily suggest a causal relationship between the two developments, however, and it seems unlikely that there was one. The argument for attributing such a relationship might run something like this: international norms that would have been treated as mandatory as the result of natural law now had to be encompassed within a general consent-based theory of CIL. The notion of consent was therefore adjusted such that it could be based on the consent of the community of nations rather than on the consent of individual nations. An individual right of opt-out, however, was inconsistent with this community-based conception of consent.<sup>108</sup>

We think that this account is implausible for several reasons. First, the jurisprudential shift away from natural law and toward positivism had been occurring throughout the nineteenth century—and, indeed, had started well before that century<sup>109</sup>—so it would not explain why the Mandatory View developed as late as it did. On the U.S. Supreme Court, for example, Chief Justice Marshall famously articulated a positivist view of international law as early as 1825, in a decision involving the legality of the slave trade.<sup>110</sup> Marshall,

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<sup>106</sup>. *Id.*

<sup>107</sup>. See Dodge, *supra* note 54, at 551–52.

<sup>108</sup>. For suggestions somewhat along these lines, see A.V. Lowe, *Do General Rules of International Law Exist?*, 9 REV. INT’L STUD. 207, 212 (1983); Raphael M. Walden, *The Subjective Element in the Formation of Customary International Law*, 12 ISR. L. REV. 344, 348 (1977).

<sup>109</sup>. See, e.g., MALANCZUK, *supra* note 34, at 16; Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 11 (1999); Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT’L L. 239, 250–53 (1932); see also LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS, at xxiv (5th ed. 2009) (noting support for positivism among international law publicists in the eighteenth century).

<sup>110</sup>. See *The Antelope*, 23 U.S. (10 Wheat.) 66, 121 (1825) (“Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part, and to whose law the appeal is made.”).

it will be recalled, also endorsed the Default View of CIL in decisions such as *Schooner Exchange*.<sup>111</sup> Second, even if the shift toward positivism and the adoption of the Mandatory View had happened at the same time, it is not obvious why there would be a causal relationship between the two. If anything, one would expect that a shift to positivism, which seeks to ground law (including international law) in a sovereign source,<sup>112</sup> would result in a less binding conception of CIL, given that the international community lacks a central sovereign (and this was even more so at the end of the nineteenth century than it is today). In addition, even if treatise writers were attempting to replicate the effect of natural law in a positivist framework, this does not explain why they would view *all* of CIL as now subject to the Mandatory View, something that was not true even when natural law was in favor. Instead, they could have done what Vattel did, distinguishing between certain norms for which there was presumed consent and other norms for which actual consent was required.

Professor Kelly suggests an alternative account. He contends that Western states (and their treatise writers) were concerned about the infusion of new and non-Western states into the international system and wanted to ensure that these states could not opt out of the rules developed by the Western states.<sup>113</sup> This account seems more plausible than the positivism theory. Oppenheim's treatise, for example, specifically links the "family of nations" idea underlying the Mandatory View to the issue of new states.<sup>114</sup> Moreover, there is evidence that American and British support for restricting opt-out rights under CIL was tied to a concern about new states.<sup>115</sup> This account also plausibly links up with the later rise of the persistent objector doctrine, as we explain below.

Under this account, the Mandatory View was used by Western powers to impose their standards on weaker, "uncivilized" countries. In this light, the Mandatory View was part of a larger pattern in which treaty "capitulations" and other forms of international law were used as another form of

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111. See, e.g., *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137, 147 (1812).

112. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 44 (2005).

113. See Kelly, *supra* note 14, at 510-11.

114. See OPPENHEIM, *supra* note 98, § 12, at 17; see also WESTLAKE, *supra* note 97, at 82 ("No new state, arising from the dismemberment of an old one within the geographical limits of our international society, has the option of giving or refusing its consent to the international law of that society.").

115. See J.G. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 13-14 (1947).

colonialism.<sup>116</sup> Furthermore, it is easy to imagine that Western publicists would not have taken seriously the possibility that the uncivilized states should be allowed to withdraw from the law created by their civilized brethren. This account, however—whereby “universal norms were imposed on non-Western societies under the guise of a minimum standard of civilization while imperial expansion into Africa and Asia continued”<sup>117</sup>—does not provide a normative justification for adhering to the Mandatory View, especially in a postcolonial world made up of nearly two hundred heterogeneous nations. In fact, it provides a basis for questioning the normative underpinnings of the Mandatory View.<sup>118</sup>

Whatever the explanation for the shift, there are reasons to believe that it may have occurred more in academic commentary than in state practice. Consider the issue that appears to have been a central driving force behind the Mandatory View: the desire to bind new states to rules worked out by the Western states. Under the Mandatory View, new states allegedly come into the system bound by all existing CIL rules and lack any right of unilateral opt-out. In fact, this issue was never genuinely settled. As one commentator explains:

In the late 1950s and early 1960s, dozens of new states gained their independence and challenged customary international law. Many of these states refused to consider themselves bound by a law in whose formation they had not participated and which, they maintained, did not reflect their own cultural and legal traditions.<sup>119</sup>

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116. See, e.g., KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 17 (2009); David P. Fidler, *The Return of the Standard of Civilization*, 2 CHI. J. INT'L L. 137 (2001).

117. Kelly, *supra* note 14, at 510 n.254; see also ANGHIE, *supra* note 112, at 62 (“All non-European societies, regardless of whether they were regarded as completely primitive or relatively advanced, were outside the sphere of law, and European society provided the model which all societies had to follow if they were to progress.”).

118. For discussion of how the “Family of Nations” concept underlying the Mandatory View was invoked by commentators like Westlake and Oppenheim to justify subjugation of indigenous peoples, see S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 27–29 (2d ed. 2004). For discussion of how the Mandatory View was used to buttress arguments that disfavored the newly independent states during debates in the 1960s and 1970s over whether the new states were required to assume the debts and treaty obligations of their colonial masters, see JAMES THUO GATHII, WAR, COMMERCE, AND INTERNATIONAL LAW 158–59 (2010).

119. Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 478 (1991).

Ultimately, the issue of the international responsibilities of new states was not resolved as a matter of CIL but was instead addressed on an ad hoc basis and through the conclusion of treaties (such as bilateral investment treaties).<sup>120</sup>

Moreover, if the Mandatory View had become fully accepted in practice, it seems difficult to explain some of the changes that took place in international law during the twentieth century. Consider, for example, the shift in sovereign immunity that occurred in this time period. Prior to the twentieth century, most nations adhered to the “absolute” theory of sovereign immunity, pursuant to which they would give foreign nations sued in their courts immunity from essentially any cause of action. Starting in the late nineteenth and early twentieth centuries, nations started shifting to the “restrictive” theory of immunity, pursuant to which they would give immunity to foreign states sued in their courts only for public, sovereign acts, not private, commercial acts.<sup>121</sup> The United States was a latecomer to this shift, not formally adopting the restrictive theory until the Tate Letter in 1952.<sup>122</sup> During the period of the shift, nations were not generally alleged to be violating international law. Rather, they were viewed as simply staking out a new position on immunity that was contrary to the default position. In particular, countries that had citizens engaged in commercial transactions with foreign nations felt the need to limit sovereign immunity. After a while, the default itself shifted.

Finally, it should be noted that commentators who advocated the Mandatory View often had a different conception of how CIL would operate from the one that is common today. In particular, these commentators understood CIL as arising out of a consensus of a small number of “civilized” states and as presumptively binding these states only in their relations with each other.<sup>123</sup> In addition, some of these commentators thought that new rules

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120. See, e.g., GATHII, *supra* note 118, at 158-68; Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 651-58 (1998); cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428-30 (1964) (declining to apply the CIL prohibition on expropriation of alien property because it was too controversial). Capital-exporting nations such as the United States insisted, unsurprisingly, that the property rights regime was mandatory. See, e.g., 3 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 656 (1942) (quoting diplomatic note from the United States to Mexico).

121. See GAMAL MOURSİ BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 115-28 (1984).

122. See *Austria v. Altmann*, 541 U.S. 677, 689-90 (2004); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486-87 (1983).

123. See, e.g., HALL, *supra* note 66, at 42-43; see also Oscar Schachter, *New Custom: Power, Opinio Juris and Contemporary Practice*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI* 531, 536 (Jerzy

of CIL could not even develop unless all of the relevant states agreed to the change.<sup>124</sup> In effect, these ideas meant that each of the “civilized” states would have a veto over CIL’s formation. Such a conception of CIL might have made sense when the international community was small and comprised of states that had frequent and repeated dealings with each other, in addition to significant religious and ethnic commonalities. As discussed in the next section, however, as the international community of states expanded, both the civilized-states idea and the idea of a veto right for every state became problematic. Commentators addressed this difficulty, it appears, by formulating the persistent objector doctrine, pursuant to which CIL could be created even over the objection of a dissenting state. For present purposes, the most important point is that the shift in the commentary toward the Mandatory View occurred against the backdrop of an understanding of CIL formation that is different from the one that prevails today.

### B. *Persistent Objector Doctrine*

In this Section, we attempt to move closer to the intellectual origins of the Mandatory View of CIL by approaching it from the other direction. In particular, we consider here the roots of the persistent objector doctrine, which is the one exception to the Mandatory View’s disallowance of unilateral opt-out. According to this doctrine, nations may avoid becoming bound by a CIL rule by persistently objecting to the rule prior to the time when it becomes established.<sup>125</sup> The doctrine is controversial, although the weight of modern academic commentary appears to support it.<sup>126</sup>

As we explain, commentary on the doctrine did not begin until the 1950s, after a pair of ambiguous ICJ decisions. The doctrine did not become a

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Makarczyk ed., 1996) (“As a historical fact, the great body of customary international law was made by remarkably few States. Only the States with navies—perhaps 3 or 4 made most of the law of the sea.”).

124. See, e.g., CHARLES G. FENWICK, *INTERNATIONAL LAW* 35 (1924) (“By strict definition, international law should embrace only such rules of conduct as are recognized by *all the members* of the international community.” (emphasis added)); see also *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 43-44 (Sept. 7) (Weiss, J., dissenting) (“In reality the only source of international law is the *consensus omnium*. Whenever it appears that *all nations* constituting the international community are in agreement as regards the acceptance for the application in their mutual relations of a specific rule of conduct, this rule becomes part of international law . . . .” (emphasis added)).

125. See *supra* note 32 and accompanying text.

126. See INT’L LAW ASS’N, *supra* note 5, at 27 (“Although some authors question the existence of this rule, most accept it as part of current international law.”).



canonical part of CIL doctrine until sometime later, perhaps not until the 1970s or 1980s. Initially, the doctrine was defended in the commentary as a way to allow CIL to develop even when some states objected to it. The assumption appears to have been that, without the persistent objector doctrine, it might not have been possible for a new rule of CIL to arise in the face of objection by one or a few states. Some commentators, however, defended the persistent objector doctrine as stemming from a requirement of state consent in international law, and critics of the doctrine have similarly described it in those terms, while challenging the purported consent requirement.

Although this history of the persistent objector doctrine does not fully explain the shift to the Mandatory View, it shows that there was uncertainty in the mid-twentieth century over how, precisely, the Mandatory View was supposed to work. Moreover, this history may suggest a reason why the Mandatory View has generated little academic debate. In particular, it appears that commentary on the persistent objector doctrine evolved in such a way as to create a narrow choice between the Mandatory View with the persistent objector doctrine and the Mandatory View without the persistent objector doctrine, thereby obscuring a potential role for the Default View of CIL.

### 1. *Asylum and Fisheries Cases*

Two decisions from the ICJ in the early 1950s are typically cited as being the source of the persistent objector doctrine.<sup>127</sup> The *Asylum Case* involved a dispute between Colombia and Peru over Colombia's decision to grant diplomatic asylum to a Peruvian citizen who had been charged by Peru with the crime of "military rebellion."<sup>128</sup> At issue was whether Colombia had the right to bind Peru to its determination that the offense in question qualified for asylum.<sup>129</sup> The ICJ held that Colombia had not established the existence of such a right under CIL.<sup>130</sup> In the alternative, the court briefly stated that, even if such a right existed as a matter of custom in Latin America, it could not have been invoked against Peru because, by not signing certain conventions that ostensibly supported such a right, Peru had opted out of it.<sup>131</sup>

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127. See, e.g., MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 180-81 (1999); INT'L LAW ASS'N, *supra* note 5, at 27 n.69; WOLFKE, *supra* note 28, at 66 n.63.

128. *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 266, 273 (Nov. 20).

129. *Id.* at 273-74.

130. *Id.* at 274-76.

131. *Id.* at 277-78.

As others have noted, the *Asylum Case* provides little support for the persistent objector doctrine. Most of the court's analysis is dedicated to showing that the alleged CIL right does not exist. The court's brief analysis of Peru's objection to the alleged right concerns a regional custom rather than a general norm of CIL.<sup>132</sup> Moreover, this analysis does not seem to require that Peru have engaged in anything like persistent objection or even that its tacit objection have occurred prior to the formation of the CIL rule. Indeed, the ICJ's analysis of this issue could easily be viewed as articulating the Default View of CIL.

The *Fisheries Case*, decided a year later, pitted the United Kingdom against Norway. At issue was whether Norway had used a legally acceptable method in drawing the baseline from which it measured its territorial sea.<sup>133</sup> The United Kingdom argued that CIL did not allow the length of a baseline drawn across a bay to be longer than ten miles.<sup>134</sup> Again, as with the *Asylum Case*, the primary holding of the case was that the alleged CIL rule did not exist.<sup>135</sup> In the alternative, the court briefly remarked that, had the rule existed, it would not have applied against Norway because Norway had "always opposed any attempt to apply it to the Norwegian coast."<sup>136</sup> This language is often cited in support of the persistent objector doctrine, but it could just as easily be read to support the Default View of CIL; there is nothing in this language that suggests that Norway's opposition must have occurred prior to the establishment of the alleged rule of CIL. The arguments of the parties do not resolve this uncertainty: although the United Kingdom appears to have supported something like the modern persistent objector doctrine, at least for rights historically exercised by a state (while asserting that Norway had not met its requirements),<sup>137</sup> Norway (which prevailed in the case) appears to have supported something closer to the Default View.<sup>138</sup>

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<sup>132.</sup> See D'AMATO, *supra* note 52, at 252-53.

<sup>133.</sup> *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116, 125 (Dec. 18).

<sup>134.</sup> *Id.* at 131.

<sup>135.</sup> *Id.*

<sup>136.</sup> *Id.*

<sup>137.</sup> The United Kingdom argued that Norway was required to show that other nations had acquiesced in Norway's historic claim. See Reply Submitted by the Government of the United Kingdom and Northern Ireland, *Fisheries Case* (U.K. v. Nor.), 1950 I.C.J. Pleadings 291, 303 (Nov. 28, 1950).

<sup>138.</sup> See ELIAS & LIM, *supra* note 100, at 61-62 (describing the different positions of the United Kingdom and Norway and noting that it is unclear to which dissent doctrine the court was referring).

## 2. Academic Commentary

In commenting on the *Fisheries* decision in 1953, Gerald Fitzmaurice, Legal Advisor to the British Foreign Office, stated that the decision supported a right to opt out of a CIL rule “before it has crystallized into a definite and generally accepted rule of law” but that it did not support a right to opt out after a CIL rule becomes established.<sup>139</sup> His conclusions were based on a parsing of the decision rather than on theoretical considerations.<sup>140</sup>

A more theoretical explanation for the persistent objector doctrine appeared about nine years later, in Humphrey Waldock’s *General Course on Public International Law*, published in 1962.<sup>141</sup> In discussing the *Asylum* and *Fisheries* decisions, Waldock, a prominent Oxford professor, stated that these decisions “seem clearly to indicate that a customary rule may arise notwithstanding the opposition of one State, or even perhaps a few States, provided that otherwise the necessary degree of generality is reached.”<sup>142</sup> As a tradeoff, however, the “rule so created will not bind the objectors.”<sup>143</sup> Importantly, Waldock was not developing these points to argue that CIL, or the persistent objector doctrine, was grounded in state consent. Instead, he was pushing *against* a consent-based approach to CIL. Thus, he argued that

in order to invoke a custom against a State it is not necessary to show specifically the acceptance of the custom as law by that State; its acceptance of the custom will be presumed so that it will be bound unless it can adduce evidence of its actual opposition to the practice in question.<sup>144</sup>

Four years later, however, a British lawyer, Ian Brownlie, published the first edition of what would become perhaps the most famous modern treatise on international law.<sup>145</sup> In that treatise, Brownlie appears to have coined the

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139. Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, 30 BRIT. Y.B. INT’L L. 1, 26 (1953).

140. *Id.* For a suggestion that modern academic acceptance of the persistent objector doctrine can be traced to Fitzmaurice’s article, see Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 115, 127 (Malcolm D. Evans ed., 2d ed. 2006).

141. See Humphrey Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 1 (1963).

142. *Id.* at 50.

143. *Id.*

144. *Id.*

145. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (1st ed. 1966).

term “persistent objector” to refer to the ability of a dissenting state to opt out of an emerging CIL rule.<sup>146</sup> Without elaboration, Brownlie stated that the allowance of an opt-out based on persistent objection “is explained by the fact that ultimately custom depends on the consent of states.”<sup>147</sup> Unlike Waldock, therefore, Brownlie tied the persistent objector doctrine to a consent-based conception of CIL.

Other commentators similarly have suggested that the doctrine stems from a requirement of consent. The French theorist Prosper Weil, for example, observed in a famous article that the persistent objector doctrine (in support of which he cited the *Asylum* and *Fisheries* decisions) is the “acid test of custom’s voluntarist nature.”<sup>148</sup> Similarly, Hersch Lauterpacht, a leading international lawyer in Britain and a judge on the International Court of Justice, tied the persistent objector doctrine to a consent-based theory of international law. In a collection of his papers published in 1970 (ten years after his death), Lauterpacht contended that the requirement of state consent for CIL was “a requirement of substance inasmuch that, although it is not necessary to prove the consent of every State, express dissent in the formative stage of a customary rule will negate the existence of custom at least in relation to the dissenting State.”<sup>149</sup>

About a decade after the publication of Brownlie’s treatise, Michael Akehurst, another British theorist, set forth a more elaborate defense of the persistent objector doctrine in a general article on CIL.<sup>150</sup> Akehurst argued that the *Fisheries* decision supported a right to opt out of an emerging CIL rule, and he disputed narrower readings of the decision by other commentators.<sup>151</sup> He also argued that an ability to opt out was needed to avoid theoretical problems raised by CIL:

If the dissent of a single State could prevent the creation of a new rule, new rules would hardly ever be created. If a dissenting State could be

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146. See *id.* at 8; Olufemi Elias, *Some Remarks on the Persistent Objector Rule in Customary International Law*, 6 DENNING L.J. 37, 37 (1991) (“Since the publication of the first edition of Brownlie’s *Principles of Public International Law* in 1966, the term ‘persistent objector’ has become a term of art in international law.”).

147. BROWNLIE, *supra* note 145, at 8.

148. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 434 (1983).

149. 1 HERSCH LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS 66 (E. Lauterpacht ed., 1970).

150. See Akehurst, *supra* note 36.

151. *Id.* at 24-25.

bound against its will, customary law would in effect be created by a system of majority voting; but it would be impossible to reach agreement about the size of the majority required, and whether (and, if so, how) the 'votes' of different States should be weighted.<sup>152</sup>

Like Waldock, Akehurst described the persistent objector doctrine as part of a system whereby "dissent by some States does not prevent the creation of new customary rules by other States; it is merely that the dissenting States are not bound by the new rules."<sup>153</sup>

Under Waldock's and Akehurst's view, the persistent objector doctrine was a device to make it *easier* for CIL rules to become established. Critics of the persistent objector doctrine, however, have suggested that the adoption of this doctrine involves a return to an outdated consent-based conception of international law. The most prominent example of such criticism is an article by Jonathan Charney, an American law professor, published in 1985.<sup>154</sup> Charney expressed the view that "[i]t is difficult to see how the acceptance of this [persistent objector] rule does not reflect an acceptance of the consent theory of international law."<sup>155</sup> Not only is such a theory against the weight of modern commentary, he contended, but it is incoherent, because it "does not explain why silent dissenters and dissenters who make their objections known after the rule has become international law are bound."<sup>156</sup> In other words, Charney's argument was that the persistent objector doctrine did not make theoretical sense if one assumes the Mandatory View of CIL. He did not entertain the possibility that the Mandatory View itself might be suspect.

Despite objections like these, the persistent objector doctrine is now part of the canonical understanding of CIL. It is unclear precisely when this occurred, but it might not have been until the 1970s or 1980s. The *Restatement (Second) of the Foreign Relations Law of the United States*, published in 1965, does not mention the doctrine. It is mentioned, however, in the *Restatement (Third)*, published in 1987,<sup>157</sup> and it was mentioned in the first draft of that *Restatement*,

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<sup>152</sup>. *Id.* at 26.

<sup>153</sup>. *Id.* at 26-27.

<sup>154</sup>. See Charney, *supra* note 35.

<sup>155</sup>. *Id.* at 16.

<sup>156</sup>. *Id.*; see also Guzman, *supra* note 29, at 166 ("[C]onsent theories cannot explain why the persistent objector doctrine puts such a significant burden on the objector not only to demonstrate its lack of consent, but to do so repeatedly and during the emergence of the rule.").

<sup>157</sup>. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987).

circulated in 1980.<sup>158</sup> The doctrine did not appear in the Eighth Edition of the Oppenheim treatise on international law, published in 1955, but it does appear in the Ninth Edition, published in 1992.<sup>159</sup> The Inter-American Commission on Human Rights, in a 1987 decision concerning the execution of juvenile offenders in the United States, accepted the existence of the persistent objector doctrine with respect to ordinary CIL, but reasoned that the doctrine does not apply to *jus cogens* norms.<sup>160</sup> A committee of the International Law Association endorsed the doctrine in 2000, noting that “most [authors] accept it as part of current international law,” and that “[t]here is a measure of judicial and arbitral support for the existence of the rule, and no decisions which challenge it.”<sup>161</sup>

### 3. *Implications for the Mandatory View*

We agree with critics of the persistent objector doctrine that, when viewed in isolation, the doctrine is a modern creation with little support outside of academic commentary. The *Asylum* and *Fisheries* decisions provide no more than passing and ambiguous support for the doctrine. State practice since those decisions is also relatively unhelpful, since there have been essentially no instances in which states have invoked the doctrine. As Professor Stein reported in a 1985 article, his research had “failed to turn up any case where an author provided even one instance of a state claiming or granting an exemption from a rule on the basis of the persistent objector principle—excepting of course the *Asylum* and *Fisheries* cases themselves.”<sup>162</sup> Although there have been

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158. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (Tentative Draft No. 1, 1980).

159. Compare 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 17-19 (8th ed. 1955), with 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 5, at 29.

160. See *Roach v. U.S.*, Case 9647, Inter-Am. Comm’n H.R., Report No. 3/87, OEA/Ser.L./V/II.71, doc. 9 rev. 1 ¶ 54 (1987).

161. INT’L LAW ASS’N, *supra* note 5, § 15, at 27. The committee lists Bynkershoek as an “early example” of an author allegedly endorsing the persistent objector doctrine, but, on the page of Bynkershoek’s treatise cited by the committee, Bynkershoek actually endorses the Default View of CIL. He asks, “Can a nation abolish the immunities of ambassadors, which they are enjoying in accordance with the common law of the nations?” He then answers: “I think that it can if it makes a public announcement in regard to them, because these immunities owe such validity as they have not to any law but only to a tacit presumption. One nation does not bind another, and not even a consensus of all nations except one binds that one, isolated though it be, if it is independent and has decreed to use other laws.” BYNKERSHOEK, *DE FORO LEGATORUM*, *supra* note 57, at 106.

162. Stein, *supra* note 32, at 459; see also, e.g., Patrick Dumberry, *Incoherent and Ineffective: The Concept of the Persistent Objector Revisited*, 59 INT’L & COMP. L.Q. 779, 784-93 (2010).

predictions in the literature that states would begin to invoke the doctrine more frequently (in response, for example, to the increased efforts by U.N. organs to influence the development of CIL),<sup>163</sup> this prediction has not come to pass.

We part company with the critics, however, over the implications of this conclusion. When viewed in context, the rise of the persistent objector doctrine in the academic literature reveals that there were substantial uncertainties in the mid-twentieth century over how the Mandatory View was supposed to work in a world with an ever-growing number of states. Some defenders of the doctrine thought that, under the Mandatory View, new CIL rules might be permitted to arise only if essentially every affected state acquiesced in the new CIL rule. The persistent objector doctrine was thus an effort to facilitate the development of CIL, not an effort to make CIL more consensual. In that light, the rise of the persistent objector doctrine did not represent a shift back toward a greater consent requirement in international law, as critics suggest. Indeed, it may have been part of an effort to make international law *less* consensual. Again, the key point is that the development by commentators of the persistent objector doctrine, as with the development of the Mandatory View more generally, occurred against a backdrop of uncertainty and debate about how CIL operates.

The fact that the debate over the persistent objector doctrine has been framed the way it has, as a choice between a Mandatory View with the doctrine and a Mandatory View without the doctrine, may also help explain why there has not been more academic scrutiny of the Mandatory View itself. This choice has little practical consequence, because the standards for the persistent objector doctrine are difficult to meet, and almost no state has ever invoked it, let alone done so successfully. Framing the choice in this way is also heavily loaded, since commentators who think that state consent is important are unlikely to rally around either of the choices. Perhaps most importantly, when the choice is framed in this way, it obscures a potential role for the Default View of CIL.

Finally, the almost complete lack of state invocation of the persistent objector doctrine provides an additional reason to question the extent to which the Mandatory View reflects actual state practice, as opposed to the position of commentators. In the treaty context, the best analogy to the persistent objector doctrine is the ability of nations to attach reservations to their ratification of treaties, thereby opting out of particular rules prior to becoming bound by the

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163. See, e.g., BROWNLIE, *supra* note 27, at 11; Stein, *supra* note 32, at 466.

remainder of the treaty.<sup>164</sup> Importantly, the ability to opt out in this manner is not simply hypothetical but is instead a common phenomenon in treaty practice.<sup>165</sup> This is true even though, unlike for CIL under the Mandatory View, many treaties also allow for subsequent unilateral withdrawal. If the Mandatory View is correct, therefore, it is puzzling that the persistent objector doctrine is not reflected in state practice.

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We have shown that the Mandatory View was not always canonical, that its adoption in the early twentieth century may have stemmed from questionable normative premises relating to the distinction between “civilized” and “uncivilized” states, and that even after it became conventional wisdom there continued to be significant uncertainties about how it would operate in practice. These findings suggest that historical pedigree alone may not be sufficient to justify the Mandatory View. In the remainder of the Article we consider whether this View can nevertheless be justified on functional terms from the perspective of the modern international system.

#### IV. FUNCTIONAL ASSESSMENT OF THE MANDATORY VIEW

We now begin to consider the functional desirability of the Mandatory View. According to that view, nations that do not persistently object to CIL rules prior to their formation are disallowed from unilaterally opting out of them. We begin in this Part by describing some reasons why such a restriction on opt-out seems questionable from an institutional-design perspective. These reasons include the vague process of CIL formation, the possibility that CIL rules will be unduly sticky and that nations will opportunistically create holdout problems, and the limited ability of the Mandatory View to respond to changing conditions. In the next Part, we consider possible justifications for restricting the ability of nations to opt out of CIL rules. Because there is little theoretical defense of the Mandatory View in the literature, we are compelled to speculate about some of these justifications. Ultimately, we conclude that, while there may be good arguments for restricting opt-out in select areas of

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<sup>164</sup>. See generally AUST, *supra* note 3, ch. 8 (describing the international law governing the attachment of reservations); Richard W. Edwards, Jr., *Reservations to Treaties*, 10 MICH. J. INT'L L. 362 (1989) (same).

<sup>165</sup>. See, e.g., AUST, *supra* note 3, at 133-34 (noting that many states attach reservations).



CIL, it is difficult to justify the Mandatory View as a general account of how CIL should operate.

A threshold objection to our inquiry might be that the current system—that is, the Mandatory View of CIL—must work well, or else it would have been changed. There are at least four answers to this objection. First, as discussed in Part I, the modern regime of CIL has increasingly been criticized—for example, as being incoherent, undemocratic, or ineffectual—prompting some commentators to attempt to “save” CIL or “reconcile” its tensions.<sup>166</sup> There are signs, in other words, that the system may not be working well. Second, as we hope to have shown, there is evidence that the current system may not have persisted for as long as many assume and that its foundations may be rooted in normatively unattractive propositions. Third, there is no particular reason to conclude that the state of the law at a given time is always optimal. This assumption is particularly problematic with respect to international law, since, as we explain below, it lacks some of the mechanisms common in a domestic legal system for addressing inefficiencies. Finally, even if one assumes that the very existence of the current system constitutes evidence of its optimality, there remains the intellectual puzzle of why a restricted exit system would be optimal. Unearthing the answer to that puzzle is, for us, a sufficient reason for this inquiry.

#### *A. Process of CIL Formation*

There are a variety of reasons to think that the Mandatory View does not reflect an optimal design. The first reason concerns the process by which CIL is formed. As scholarship on voting rules and constitutional design makes clear, in the structure of any regulatory scheme, the processes governing rule creation should be related to those governing alteration.<sup>167</sup> In particular, stringent alteration rules are normally adopted only when the process for rule formation is relatively clear, stringent, and involves a high degree of deliberation. This is often true with national constitutions where, in order to ensure institutional stability and to protect minority rights from encroachment, certain rights are made difficult to alter absent a high degree of consensus. In those situations, precisely because alteration in the future is difficult, participants often insist on

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<sup>166</sup> See, e.g., Guzman, *supra* note 29; Roberts, *supra* note 13.

<sup>167</sup> See, e.g., Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 LOY. L.A. L. REV. 193, 225-26 (2003) (noting the symmetry between difficult formation rules and difficult exit rules for not only domestic constitutions, but also treaties); John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 426 (2003) [hereinafter *Symmetric Entrenchment*].

a rule-formation process that instills confidence—something that can involve requiring a high degree of transparency, public participation, and detached decisionmaking.<sup>168</sup> When the rules in question bind not just the current generation of voters but also future generations, the need for careful, detailed, and difficult processes of rule formation that will generate high-quality rules becomes even more important.<sup>169</sup>

As discussed in Part I, the formation rules for CIL are notoriously unclear. No one knows precisely how much state practice is required to create a CIL rule, what form that practice must take, or how long it must last.<sup>170</sup> The standards for identifying the requisite *opinio juris* for CIL are even less clear.<sup>171</sup> As noted in a popular international law treatise, “Customary international law is ordinarily found by a more or less subjective weighing of the evidence, and subjective scales tilt differently in different hands.”<sup>172</sup> Moreover, the mechanisms for creating CIL have become broader and more relaxed in the modern era, with less emphasis on state practice, and CIL rules can form much more quickly than in the past (even instantly, some argue).<sup>173</sup>

The Mandatory View is therefore contrary to the observation in the voting rules and constitutional design literatures, which is that difficult alteration rules should be reserved for situations in which the formation rules are relatively clear and stringent. With CIL, we have relatively vague and easy formation rules matching up to a high difficulty of alteration—an asymmetry that seems to have increased over time. On the flip side, some of the rules created under the new process of CIL formation, such as in the human rights area, are considered to be even more binding than those created via the old processes (especially if they have the status of *jus cogens* norms), further increasing the asymmetry between formation and alteration rules in CIL. To be sure, this observation accepts as a given modern accounts of how CIL can arise more quickly and can be influenced by multilateral treaties and

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168. Cf. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 383–84 (1995) (discussing the need for detached deliberation in constitution-making); Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment and International Law*, 38 N.Y.U. J. INT’L L. & POL. 707, 710, 722–23 (2006) (discussing the lock-in characteristic that is found in most national constitutions).

169. On the relationship between formation processes, rule quality, and exit rules, see John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002); *Symmetric Entrenchment*, *supra* note 167, at 425.

170. See *supra* notes 25–27 and accompanying text.

171. See *supra* notes 30–31 and accompanying text.

172. MARK WESTON JANIS, *INTERNATIONAL LAW* 57 (5th ed. 2008).

173. See *supra* note 28 and accompanying text.

pronouncements and decisions of international institutions; it is less applicable if one rejects these modern claims.

Even if rooted in genuine state practice, the process of CIL formation raises questions about the quality of the rules that are produced. If rules are going to be difficult to exit from, participants will rationally want to ensure that they are of a high quality.<sup>174</sup> The literature on social norms makes clear that customary rules are most likely to be of high quality when developed in a small, homogenous group, with frequent opportunities for interaction among members of the interpretive community.<sup>175</sup> Unlike the era in which courts talked about CIL rules as existing among a handful of “civilized” states, today CIL is said to arise from the practices of, and become binding on, all 192 nations of the world. These 192 nations have wide variations in ethnicity, culture, politics, resources, and economics. Further, these nations often only have limited interaction with each other on particular issues and are unlikely to have adequate incentives to police and punish rule violations by each other.<sup>176</sup> These conditions make it less likely that the aggregation of state practice, which is the basis for traditional CIL formation, will generate efficient rules.<sup>177</sup>

We might have more confidence that CIL rules would develop in an efficient manner in a system that operated against the backdrop of regular adjudication. One argument for the efficiency of the common law, for example, is that inefficient rules are more likely to be litigated because they impose greater costs on the parties.<sup>178</sup> Courts, the argument goes, will learn from each other and evolve toward rules that reduce the number of disputes. The problem for CIL is that, unlike in the common law litigation model, the number of disputes that are heard by international tribunals is small, and most international disputes are instead addressed through diplomatic channels.<sup>179</sup>

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174. *Symmetric Entrenchment*, *supra* note 167, at 425.

175. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 177-82 (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 116, 141-43 (1992); Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 LAW & SOC. INQUIRY 383, 408-09 (2006).

176. See John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1222 (2007).

177. Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 889-94 (2006).

178. See George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 67 (1977).

179. See McGinnis & Somin, *supra* note 176, at 1223 (“[I]nternational law is tested in the crucible of litigation too rarely to make that theory of common law efficiency plausible in the international context.”).

That means that judges deciding international law matters have neither the opportunity to evaluate the analysis of the same issue by a variety of tribunals nor the incentive to reduce the numbers of disputes by shaping efficient rules.<sup>180</sup>

### B. Stickiness Concerns

A second set of concerns raised by the Mandatory View is that inefficient rules will be unduly perpetuated, something that is referred to in scholarship on contract theory as a “stickiness” problem.<sup>181</sup> Although CIL rules may not be difficult to form in the first instance, the Mandatory View makes it hard to change established rules by constraining nations from withdrawing. Presumably, the key assumption underlying this regime is that, unless constrained, nations will engage in excessive withdrawal from CIL rules. In fact, there are reasons to suspect that, even under a default approach to CIL, the system will face the opposite problem: CIL rules will remain in place even after they are no longer socially desirable. If so, the Mandatory View would be worsening an already present stickiness problem.

First, consider the assumption that a Default View will lead to excessive withdrawals. As discussed earlier, there was a significant period of time during the eighteenth and nineteenth centuries when commentators believed that nations could unilaterally withdraw from at least some rules of CIL.<sup>182</sup> We have found no indication from these commentaries, however, that this Default View led to excessive withdrawals. Nor have we found suggestions that the shift from the Default View to the Mandatory View occurred because a spate of withdrawals from CIL had undermined the system.

Second, in the modern era, nations are allegedly able to opt out of CIL rules before they form through persistent objection. Nevertheless, nations rarely invoke this right. Although there have been predictions that nations would begin invoking the persistent objector doctrine more frequently, this prediction has not been borne out.<sup>183</sup> Professor Byers suggests that part of the reason for this is that there are significant nonlegal pressures, such as the reciprocal

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180. Nor, unlike in the area of corporate law in the United States, do we see competition among courts over the quality of their CIL interpretations. Cf. *id.* (discussing competition among courts as a factor leading to increased efficiency).

181. See, e.g., Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006); Victor Fleischer, *The Missing Preferred Return*, 31 J. CORP. L. 77, 91-92 (2005).

182. See *supra* Part II.

183. See *supra* note 163 and accompanying text.

nature of most interstate relationships, that result in even powerful nations such as the United States, Japan, and the United Kingdom eventually backing away from their objections to CIL rules.<sup>184</sup> Whatever the reason, the key point is that the Mandatory View does not appear to be necessary to deter exit.

Third, as seen from Professor Helfer's research, many treaties either have explicit withdrawal clauses or implicitly allow for withdrawal.<sup>185</sup> Commentators have evinced few concerns, however, about excessive withdrawals from multilateral treaties.<sup>186</sup> Nor do we know of any evidence suggesting that nations have moved away from including withdrawal clauses in treaties due to perceived abuses.<sup>187</sup> While it could be argued that the Mandatory View of CIL is itself deterring treaty withdrawals, we think this is unlikely. Treaties and CIL do not have identical content, and many treaties are "progressive" in that they codify principles not contained in CIL.<sup>188</sup> Moreover, even when treaties and CIL contain substantively similar rules, treaties tend to be more specific and are more likely to be connected to enforcement and adjudicative mechanisms. As a result, if a nation no longer agreed with the provisions in a treaty, it would have an incentive to exercise its right of withdrawal even if it could not also exit from substantively similar CIL.

The foregoing suggests that there is little reason to be concerned that a Default View would lead to excessive withdrawal. In fact, it is possible that, even under that approach, there might actually be *insufficient* withdrawal. Drawing from scholarship on contract theory, there are reasons to believe that nations will adhere to rules well beyond the point at which they have become inefficient, even if nations had the ability to withdraw from them. Among the theoretical reasons to expect stickiness in the CIL context are what are referred to as "network externalities," "learning externalities," and "negative signals." Network externalities can arise, for example, when members of a group use a

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184. See BYERS, *supra* note 127, at 181.

185. See Helfer, *supra* note 1, at 1604-10.

186. See *id.* at 1585, 1602, 1608 (noting that the issue of treaty exit had received little attention from commentators even though "denunciations and withdrawals are a regularized component of modern treaty practice").

187. Cf. Oona A. Hathaway, *International Delegation and State Sovereignty*, LAW & CONTEMP. PROBS., Winter 2008, at 115, 131 (suggesting that modern treaties often include withdrawal clauses); Helfer, *supra* note 1, at 1593 (same); Barbara Koremenos, *When, What, and Why Do States Choose to Delegate?*, LAW & CONTEMP. PROBS., Winter 2008, at 151, 175-76 (same).

188. See Statute of the International Law Commission, G.A. Res. 174 (II), art. 15, U.N. Doc. A/RES/174(II) (Nov. 1, 1947) (defining "progressive development of international law," for purposes of the functions of the UN's International Law Commission, as "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States").

common product, such as a common contract term.<sup>189</sup> If all members of the group commit to using the same contract term, there are efficiency gains in that the individual parties do not need to spend time negotiating new provisions; everyone can assume that everyone else understands what the basic contract rules will be. A similar dynamic might operate with, for example, rules of diplomatic immunity. If nations can assume that the same rules of diplomatic immunity apply, no matter where, then there will be no need to negotiate specific rules every time a diplomatic mission is established in a new country. This benefit of standardization of rules comes with a cost, however, in that individual nations may be slow to shift to new rules even when the old rules have become suboptimal for the system.

Adding to the network effects, there may also be learning externalities, which are the benefits that come from using the same rules over a long period of time.<sup>190</sup> The longer a rule or a contract provision is used, the better understood it will be. In the CIL context, the primary actors are government bureaucrats. One might expect that the government bureaucrats responsible for international relations, once they develop expertise in operating with a certain set of rules, will be reluctant to change.<sup>191</sup> Network and learning externalities will often operate in conjunction with each other to erect barriers to change.<sup>192</sup> One can imagine, for example, lawyers in the various ministries of defense who are specialists in the rules of war under some combination of CIL and the Geneva Conventions. Many of the existing rules governing war are likely outdated, in that they were designed for different types of armed conflict

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189. See, e.g., Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 348-49 (1996) [hereinafter Kahan & Klausner, *Path Dependence*]; Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 715-16 (1997) [hereinafter Kahan & Klausner, *Economics of Boilerplate*].

190. See, e.g., Kahan & Klausner, *Path Dependence*, *supra* note 189, at 350-53.

191. For a discussion of how the incentives and choices of bureaucrats can drive compliance with international law, see ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 4, 274-82 (1995).

192. See Kahan & Klausner, *Economics of Boilerplate*, *supra* note 189, at 725-27; see also Zachary Elkins & Beth Simmons, *On Waves, Clusters, and Diffusion: A Conceptual Framework*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 39-41 (2005) (applying network effects to explain diffusion in the international context).

than the types of conflicts we see today.<sup>193</sup> Nevertheless, some combination of network and learning externalities probably produces barriers to change.<sup>194</sup>

Finally, concerns about sending negative signals may add to stickiness. In settings where reputations are important, and the parties have incomplete information about each other's intentions, parties will be concerned about sending the wrong signals to their counterparties.<sup>195</sup> Altering a standard contract term, for example, presents the risk that it will raise the suspicions of counterparties that something is amiss. The same dynamic may apply in the CIL context. Fearing a negative inference by others, nations may be unwilling to deviate from long-established rules of interaction, even when those rules are recognized as inefficient.<sup>196</sup>

The foregoing theoretical conjectures are supported by empirical evidence from the field of sovereign debt contracts. The standard provisions in these contracts are distillations of norms of debtor-creditor behavior that have evolved over long periods of time (akin to customary norms) and (unlike under the Mandatory View for CIL) are also defaults in that nations are free to alter them.<sup>197</sup> Multiple studies show that states, despite the option to alter provisions, adhere to inefficient contract provisions long after these provisions are recognized to have become inefficient.<sup>198</sup> The evidence further suggests that among the reasons for this stickiness are network effects and concerns about negative signals.<sup>199</sup> A caveat here is that the foregoing evidence draws on the

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193. See *supra* note 21 and accompanying text.

194. For a more general treatment of how inefficient rules or norms can persist in a custom-based system, see Francesco Parisi, *Spontaneous Emergence of Law: Customary Law*, 5 *ENCYCLOPEDIA L. & ECON.* 603, 612-14 (2000).

195. See, e.g., Ben-Shahar & Pottow, *supra* note 181, at 651-52.

196. For a discussion of other factors that might lead to contract stickiness, including psychological factors, see Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 *CORNELL L. REV.* 608 (1998).

197. See, e.g., J.H. Dalhuisen, *Custom and Its Revival in Transnational Private Law*, 18 *DUKE J. COMP. & INT'L L.* 339, 363 (2008) (explaining that when contract terms become standard for an industry, they may acquire the form of custom).

198. See, e.g., Michael Bradley, James D. Cox & Mitu Gulati, *The Market Reaction to Legal Shocks and Their Antidotes: Lessons from the Sovereign Debt Market*, 39 *J. LEGAL STUD.* 289 (2010); Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 *EMORY L.J.* 929, 993 (2004); Karen Halversen Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 *AM. REV. INT'L ARB.* 335, 374-76 (2005).

199. See Choi & Gulati, *supra* note 198, at 993 (attributing stickiness in part to network effects); Anna Gelpern & Mitu Gulati, *Public Symbol in Private Contract: A Case Study*, 84 *WASH. U. L. REV.* 1627, 1677 (2006) (reporting on market actors describing concerns regarding negative

behavior of officials in ministries of finance rather than ministries of foreign affairs, and it is the latter who are primarily involved in CIL matters. It is unlikely, however, that officials in the ministries of foreign affairs will be less concerned about reputation and negative signals than their counterparts in the ministries of finance.<sup>200</sup> Again, one would expect this stickiness problem to be exacerbated by the Mandatory View, which (unlike in the sovereign debt context) disallows unilateral opt-out.

### C. Holdout Problems

Related to the concern about stickiness is the concern that a disallowance of unilateral opt-out will cause nations to act opportunistically and demand concessions before agreeing to any alterations of CIL (even efficient ones). In other contexts, this is referred to as a “holdout” problem.<sup>201</sup> As noted, the precise fraction or number of nations whose approval needs to be obtained before an extant CIL rule can be altered is unclear. That lack of clarity makes it difficult to describe the precise nature of the holdout problem under the current Mandatory View. To be able to evaluate the potential holdout problem, therefore, we have to make a series of assumptions about how the current system works.

We assume that if a nation were to act in a fashion contrary to existing CIL and if few other nations objected, a new CIL rule might gradually emerge, but that objections from even a minority of nations likely would prevent this from happening.<sup>202</sup> In voting terms, acquiescence (or nonobjection) is treated in the CIL process as the equivalent of a vote of approval for the change. With that qualification, however, there is, in effect, a supermajority approval

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signals); Mitu Gulati & Robert Scott, *Three and a Half Minutes* (Nov. 13, 2009) (unpublished manuscript) (on file with authors) (reporting on the negative signal story).

200. If anything, the ministries of finance should be less concerned about sending negative signals by exiting an inefficient contract term because their signals are being interpreted by sophisticated financial markets rather than the bureaucrats in other countries.

201. See, e.g., Lloyd Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351 (1991).

202. The literature is not clear on precisely what fraction of states need to explicitly object in order to prevent a new rule of CIL from forming. Commentators suggest that a single state, by objecting, cannot bar a new rule of CIL from forming. They also suggest that CIL does not form simply as a matter of majority rule. Rather, it requires something close to a consensus. See, e.g., JAMES LESLIE BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 16-17 (Hersch Lauterpacht & C.H.M. Waldock eds., 1958); ELIAS & LIM, *supra* note 100, at 70-78; Akehurst, *supra* note 36, at 25-27. Putting together the foregoing suggests that the fraction of nations that needs to object to bar the formation of a new CIL rule is significantly less than a majority, but greater than a handful.



requirement. Such a requirement creates a potential holdout problem because a small group of nations can threaten to object vocally to, and thereby derail, attempts by other nations to deviate from existing CIL rules.

In small, homogenous groups, where the interests of members are relatively uniform and where the members interact repeatedly, social and reputational pressures can serve to alleviate holdout problems.<sup>203</sup> That means that these small groups can often afford to require a high degree of consensus before decisions are made. As groups get larger and more diverse, however, internal pressures become more diffuse, asymmetries of information increase, and the threat of informal sanctions becomes less potent. Those factors increase the risk of holdouts.<sup>204</sup>

Applying this analysis to the modern international system, which is large, heterogeneous, characterized by significant asymmetries of information, and has widely varying threats of sanctions, suggests that the system is vulnerable to holdouts. This is particularly so in contexts involving nations that have limited interactions with one another. Under such conditions, nations may be tempted to collude with others to block alterations to CIL so as to extract concessions from the nations seeking change. This could happen even if the change at issue would be value-enhancing for the group as a whole.

Such holdout problems are likely to dampen cooperation in international lawmaking. Conversely, if there were a right of withdrawal, a nation that found a CIL rule to be problematic could announce its reasons for withdrawal and propose a new rule. If there were other nations that also derived benefits from the change, and relatively few who suffered costs, this could be an occasion for a cooperative move toward a treaty. Along these lines, allowing withdrawal could also enhance collaboration in innovation and experimentation in lawmaking. Under the Mandatory View, when there are suggestions of a new rule, some nations might be concerned that the rules will turn out to have

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203. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 115 (1962); Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1373-74 (1997). The question of how factors such as group size, communication, and interaction can affect the group's ability to avoid holdout and free rider problems has also received extensive attention from researchers studying group psychology. See, e.g., Robyn M. Dawes, Alphons J.C. van de Kragt & John M. Orbell, *Not Me or Thee but We: The Importance of Group Identity in Eliciting Cooperation in Dilemma Situations*, 68 ACTA PSYCHOLOGICA 83 (1988).

204. See Rory Macmillan, *Towards a Sovereign Debt Work-out System*, 16 NW. J. INT'L L. & BUS. 57, 67 (1995) (describing the transition from syndicated loans to bonds and the increased difficulties of coordination and risks of holdouts that resulted); Christopher C. Wheeler & Amir Attaran, *Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation*, 39 STAN. J. INT'L L. 253, 260-61 (2003) (same).

unforeseen negative consequences. If so, these nations with concerns will work hard to prevent new CIL from forming out of a fear that, once it forms, it will be binding and hard to change. By contrast, if a right of future withdrawal is permitted, it provides nations with a form of insurance, in that they can experiment with how the rule works for them and then withdraw if its negative effects outweigh the benefits.<sup>205</sup>

#### *D. Adaptability to Change*

Another reason to suspect that the Mandatory View is inefficient is the continually changing nature of the international system. Restrictions on altering governance rules make the most sense when the issues are ones for which the answers are likely to remain the same regardless of changes in circumstances.<sup>206</sup> Given that CIL potentially covers all aspects of interstate interaction, there are likely to be many topics for which changes in circumstances have altered the nature of interstate interactions. Consider, for example, subjects that appear to raise the most difficult collective action problems in the modern international context: war, pollution, overfishing, disease, and terrorism.<sup>207</sup> The nature of every one of those problems has changed over the last few decades as a result of advances in technology, alterations in state behavior, and other factors.

National treaty practice shows that nations understand the need in such an international system for variety and flexibility in withdrawal rules. As discussed in Part I, there is substantial overlap today between the coverage of treaties and CIL.<sup>208</sup> Yet we know that nations often decide to include withdrawal rights in treaties. So, when nations *have* deliberated over the opt-out question, they have not chosen a mandatory regime across the board. Instead, they have agreed on opt-out rights that vary across different treaty

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205. Professor Helfer makes a similar point in the context of withdrawal rights for treaties. See Helfer, *supra* note 1, at 1591.

206. See, e.g., John O. McGinnis & Michael Rappaport, *The Condorcet Case for Supermajority Rules*, 16 SUP. CT. ECON. REV. 67, 113 (2008) (arguing that “relatively few norms should be entrenched against changing circumstances”); McGinnis & Somin, *supra* note 176, at 1209 (making the point in the international law context).

207. See ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 3-5 (2009).

208. See also, e.g., George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT’L L. 541, 544 (2005) (“CIL . . . exists in a wide variety of fields and coexists in many areas with treaty law.”).

regimes and in terms of notice or other prerequisites for their use.<sup>209</sup> Moreover, these opt-out rights are not hypothetical. Professor Helfer reports that, in the period between 1945 and 2004, there were over fifteen hundred withdrawals from multilateral treaties, and probably many more from bilateral treaties.<sup>210</sup> The greater rigidity of the Mandatory View as compared with treaty practice is peculiar, given that one of the supposed virtues of having a CIL regime exist alongside an extensive treaty regime is that CIL can evolve more easily in response to changing conditions.<sup>211</sup>

Importantly, in addition to helping to preserve the adaptability of CIL, a Default View would help protect the withdrawal rights that nations have agreed upon in treaties. Many claims concerning the content of CIL rely heavily on treaties.<sup>212</sup> The idea is that widespread ratification of a treaty can itself constitute the state practice and *opinio juris* needed to generate CIL, with the result that even nations that do not join the treaty may become bound by CIL rules that are similar to the terms of the treaty.<sup>213</sup> This proposition is not free from controversy, but if it is true it threatens to render withdrawal clauses in multilateral treaties meaningless. A nation that invoked such a clause could still find itself bound to a similar CIL rule, and the Mandatory View would deny any right of subsequent opt-out from such a rule.<sup>214</sup> Under a Default View, by contrast, opt-out rights under CIL could parallel those available under treaties.

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209. For situations in which reliance interests are substantial, such as in bilateral investment treaties, nations sometimes require a long notice period as a prerequisite for withdrawal. See Helfer, *supra* note 1, at 1625.

210. See *id.* at 1602.

211. See, e.g., NANCY KONTOU, *THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW* 10, 68-71 (1994); VILLIGER, *supra* note 27, at 38; R.R. Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 25, 97 (1971).

212. See *supra* notes 40-41 and accompanying text.

213. See Weil, *supra* note 148, at 438-40 (describing and criticizing this idea); see also Hiram E. Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L L. 973, 978 (1995) ("[The] comparative disadvantage of treaty, combined with the universal reach of customary law, currently motivates a conclusory equivalence of treaty provisions (binding only on treaty-parties) with customary, hence universally applicable, rules.").

214. Cf. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, Judgment, 1984 I.C.J. 392 (Nov. 26) (controversially relying on CIL that was similar to multilateral treaty obligations despite lack of jurisdiction to hear the treaty claims).

### *E. Professor Guzman's Proposal*

One of the few commentators to recognize the potential inefficiency of the Mandatory View is Professor Guzman, who considers CIL from the perspective of rational choice theory.<sup>215</sup> Guzman's proposed solution, however, seems incomplete.

Guzman has proposed modifying the Mandatory View to go beyond the persistent (prior) objector opt-out to allow also a narrow subsequent objector exit option. The subsequent objector, under Guzman's proposal, would have to object "from the moment at which it has an interest in the issue."<sup>216</sup> Guzman defines an "interest" as occurring when a CIL rule begins to affect a nation "in a significant way."<sup>217</sup>

Guzman's proposal is an improvement over the status quo in that it expands the existing opt-out right and corrects for the problem in the current scheme whereby nations might find themselves bound by a CIL rule that they were not even aware was in the process of crystallizing. It is not clear, however, why the subsequent opt-out right should be limited to the first time that a nation has an interest in a CIL issue. After all, exogenous shocks might occur to significantly alter a nation's interests over time.<sup>218</sup> In theory, so long as there is a significant change in interests, Guzman's own rationale should extend to allowing opt-outs at these later points in time as well. Nor is it likely to be clear when the effect of a rule becomes "significant" for purposes of Guzman's proposed test.

Guzman resists giving greater subsequent opt-out rights due to concerns about opportunistic withdrawals on the eve of a violation and the need for advance notice to other nations.<sup>219</sup> As we explain in the next Part, however, both concerns can be addressed under the framework of a Default View.<sup>220</sup> Moreover, these concerns potentially apply in the area of treaties, yet subsequent withdrawal rights are common in that context. Finally, although an improvement over the Mandatory View, Guzman's approach remains subject to some of the same objections as that view. In particular, by making it much more difficult to exit from CIL rules than from treaty rules, this approach

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<sup>215</sup>. See Guzman, *supra* note 29, at 169-71.

<sup>216</sup>. *Id.* at 170.

<sup>217</sup>. *Id.*

<sup>218</sup>. See Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 224.

<sup>219</sup>. See Guzman, *supra* note 29, at 168-69.

<sup>220</sup>. See *infra* Part V.

continues to implicate the same concerns about formation quality, stickiness, holdouts, and insufficient adjustment to changing circumstances as the Mandatory View.

## V. THE AFFIRMATIVE CASE FOR RESTRICTING OPT-OUT

Having set out reasons for skepticism about the functional desirability of the Mandatory View, we now consider some affirmative justifications for restricting opt-out from CIL. To gain traction on this question, we again draw on theories developed in the areas of contract law, corporate law, voting rules, and constitutional design. In each of those areas, scholars have considered the question of when severe restrictions on withdrawal or alteration rights should be imposed. We conclude from this literature that it is unlikely that the Mandatory View makes sense as a matter of institutional design for *all of CIL*, although restricted withdrawal rights might be justified for certain types of issues. We begin with the two justifications for the Mandatory View that we have found in the literature and then speculate about additional possible justifications.

### A. Reliance

Scholarship on CIL contains almost no theoretical explanation for the Mandatory View.<sup>221</sup> One explanation that we have found, made without elaboration, concerns reliance. Mark Villiger, in his book, *Customary International Law and Treaties*, wrote that a subsequent opt-out right “is untenable . . . because other States have come to rely on the ‘subsequent objector’ originally conforming to the rule.”<sup>222</sup>

This reliance argument is insufficient, at least as an account of why all of CIL should be subject to the Mandatory View. To say that nations should not be allowed to withdraw from CIL because others are expecting them not to withdraw is circular, since the expectation is itself affected by the rules for withdrawal. Moreover, as illustrated by the withdrawal rules in the treaty context, a notice requirement will at least sometimes be sufficient to address reliance interests, and this in fact was the view that a number of leading commentators held about CIL during the nineteenth century.

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221. There is no explanation, for example, in the sources cited *supra*, note 5.

222. VILLIGER, *supra* note 27, at 36; see also Guzman, *supra* note 29, at 168–69 (while defending a restrictive opt-out rule on reliance grounds, also advocating for a narrow subsequent objector exception).

To be sure, there are situations in which reliance interests might provide an argument for restricting withdrawal rights. The contracts literature concerning holdup problems tells us that an easy ability to withdraw from a relationship can lead to underinvestment.<sup>223</sup> Particularly in situations in which parties make sequential investments, the party making the first investment will be concerned that, once it has made its investment, it will be subject to the risk of holdup by the counterparty who can threaten to withhold its investment unless it is given something extra. Ex ante, if this risk of holdup is significant, parties will refrain from investing—hence, the underinvestment problem.<sup>224</sup>

These considerations may be relevant to some CIL issues. Imagine a CIL rule that requires all nations to scuttle their biological weapons. If, after all the other nations have scuttled their weapons, nation A, which has not yet scuttled its weapons, announces that it is withdrawing from the rule and keeping its weapons, that will give it a considerable advantage over the other nations. The other nations, fearing and expecting such opportunistic behavior in the future, will therefore not scuttle their weapons in the first place. The end result will be that no weapons are scuttled. As a result, this may be a situation in which effective cooperation depends on restricting withdrawal.

It is not clear to what extent this sort of situation, in which there is reliance and a strong incentive to cheat, can effectively be regulated by CIL. In the area of weapons control, for example, we find that nations typically turn to treaties instead of relying on CIL. These treaties, by providing mechanisms for communication, monitoring, and collective sanctions, can attempt to address the incentives that nations might have to behave opportunistically in an uncoordinated system.

In any event, the key point is that reliance interests will not be as strong for all CIL issues. Consider, for example, a CIL rule that prohibits the screening of the pouches used by diplomats for materials brought into host countries. (As with many CIL issues, a treaty currently regulates this issue, but put that complication aside for the moment.) Imagine that some nations begin abusing the diplomatic pouch—using it to smuggle in terrorism-related materials, for example. If a host nation announces that it is going to start screening the pouches—say, by using x-ray machines—it is not clear that reliance interests should bar this withdrawal from the CIL rule. Other nations will be on notice of the host country's change and can adjust their diplomatic relations

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223. See, e.g., Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 686 (2007); Vladimir Smirnov & Andrew Wait, *Hold-Up and Sequential Specific Investments*, 35 RAND J. ECON. 386, 386 (2004).

224. See, e.g., Schwartz & Scott, *supra* note 223, at 686; Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 559-63.

accordingly. In addition, the host country will be exposed to possible reciprocal screening of its own diplomatic pouches by other countries and will have had to factor in that consequence when deciding whether to withdraw from the CIL rule. Moreover, it is not self-evident that a complete lack of screening is the socially desirable outcome; if the abuse of pouches is a significant problem, limited screening may be worth the cost that it imposes on diplomatic privacy.

As a further illustration of how the Default View might be beneficial while adequately addressing reliance interests, consider the CIL on governmental succession to debts. Under this CIL, changes in a government do not eliminate a nation's debt obligations, even if the former government was corrupt and oppressive, and even if the debt was incurred for activities and projects that did not benefit the people of the nation. There is, in other words, no exception in the CIL rule for what are known as "odious debts."<sup>225</sup> A number of commentators have concluded that the current CIL rule is inefficient, either because it does not adequately deter dictators from seeking to take over the government or because it does not provide lenders with a sufficient incentive to exert care in determining whether they are assisting a despotic government.<sup>226</sup> Given these potential inefficiencies, one might imagine that it would be in the best interest of a nation that was particularly prone to takeovers by dictators to be able to exit from the traditional CIL rule and announce that in the future it would not be bound by debts determined by some neutral body to be odious. Such an announcement might make it more difficult for a subsequent dictatorship in that country to borrow money, and that fact might make a takeover less attractive to a dictator in the first place.<sup>227</sup> Under the Mandatory View, however, such a nation would not be allowed to opt out of the strict CIL

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225. The standard definition of "odious debts" comes from a Russian scholar, Alexander Sack, who suggested that nations should be allowed to repudiate debts if, with the knowledge of the lender, the debts were incurred by a despotic government for a purpose that was not in the general interests of the nation. See A.-N. SACK, *LES EFFETS DES TRANSFORMATIONS DES ETATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES* 157 (1927). Despite some claims to the contrary, the Sackian odious debt doctrine has never become part of CIL. See, e.g., Anna Gelpern, *What Iraq and Argentina Might Learn from Each Other*, 6 CHI. J. INT'L L. 391, 406 (2005).

226. See, e.g., Omri Ben-Shahar & Mitu Gulati, *Partially Odious Debts?*, LAW & CONTEMP. PROBS., Autumn 2007, at 47, 48-51; Patrick Bolton & David Skeel, *Odious Debts or Odious Regimes?*, LAW & CONTEMP. PROBS., Autumn 2007, at 83, 86-88; Seema Jayachandran & Michael Kremer, *Odious Debt*, 96 AM. ECON. REV. 82, 82-85 (2006).

227. See Jayachandran & Kremer, *supra* note 226, at 82-85. In theory, a dictatorship could attempt to opt back in to the traditional CIL rule in an effort to borrow money, but in doing so it would be implicitly stating that it wanted the flexibility to incur odious debts, something that it would likely be reluctant to announce.

rule, even though reliance interests presumably could be addressed through advance notice to creditors.<sup>228</sup>

As noted, the existence of treaties will complicate many CIL examples today, since treaties now regulate most of the subjects regulated by CIL. When reliance issues are significant, treaties are probably a better way to address them, since treaties can specifically address the issue of withdrawal and can provide mechanisms to promote stability in the treaty relationship, such as mandating arbitration or adjudication and establishing monitoring and verification regimes. Importantly, however, even in the treaty context, we find that nations often do not prohibit withdrawal. As we have seen for many treaties, withdrawal rights are either explicitly negotiated (often with a notice requirement) or, if not made explicit, assumed to exist. If nations making treaties rarely consider it necessary to bar withdrawal so as to induce the necessary amounts of reliance, it seems unlikely that such a bar would be necessary for inducing reliance with respect to CIL.

The following example, based on an accepted modern principle of international law, further illustrates that a complete ban on opt-out is not always necessary to protect reliance interests. Under modern treaty practice, many treaties, especially large multilateral treaties, do not become binding on nations until the countries engage in an act of ratification—such as sending an instrument of ratification to the United Nations. It is common, however, for a national representative to sign a treaty prior to ratification, sometimes many years prior. It is generally thought that, during the interim period between signature and ratification, a nation is legally bound under CIL not to take any actions that would defeat the object and purpose of the treaty until such time as the nation makes clear its intent not to become a party to the treaty.<sup>229</sup> The idea is that nations should not be allowed to sign a treaty and then surreptitiously take actions that substantially change the nature of the bargain between the parties. Thus, if two nations tentatively sign an agreement to cut their armaments by half, and after signing the agreement (but before ratification) one of the nations was allowed secretly to double its armaments, it would be depriving the other party of the bargain that had been reached. If this sort of behavior were allowed, nations would be less willing to make concessions in

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228. If investors know, *ex ante*, that future governments will not be legally obligated to pay debts determined to be odious, they can factor this into the original price. *Id.* at 83–85. They will also have an incentive to monitor the debtor's expenditures.

229. Like many CIL rules today, this rule is reflected in a treaty (the Vienna Convention on the Law of Treaties, see *supra* note 3). But it is also commonly said to be a rule of CIL and thus binding on nonparty countries such as the United States. See Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307 (2007).



treaty negotiations, and international cooperation would be undermined. On the other hand, a nation may have legitimate reasons for deciding not to proceed with ratification after signing a treaty, and nations would be less likely to sign treaties if such signing was irrevocable. Importantly, these competing interests are addressed by allowing opt-out subject to a notice requirement, not by disallowing opt-out altogether.

*B. Rule of Law and Legitimacy*

The only other argument for the Mandatory View that we have found in the literature, also made without elaboration, concerns the preservation of the rule of law. The idea is expressed by Martin Dixon in his treatise on international law: “[I]t is a matter of principle that states cannot avoid legal obligations once they have come into being.”<sup>230</sup>

There are several problems with this argument. First, like the reliance argument, it is circular. If a right of withdrawal is built into the law, then it does not undermine the rule of law to exercise that right. Second, treaties are not considered to be less law-like than CIL, and yet they frequently include a right of withdrawal.<sup>231</sup> Third, most international law in the nineteenth century was CIL, not treaty law, but many commentators thought that there was a right to withdraw from at least some portions of CIL, and this was not viewed as contrary to the rule of law.<sup>232</sup>

A version of the argument is that a movement away from the Mandatory View will destabilize the law because nations will withdraw from CIL whenever they conclude that it is inconsistent with their interests.<sup>233</sup> On this view, if such case of withdrawal is permitted, CIL becomes meaningless as a restraint on national action. This prediction, however, is questionable.

As a threshold matter, the Default View would allow only prospective withdrawal. Nations would still be responsible for their past actions. Withdrawals would have to be planned and announced ahead of time, thereby reducing the scope for opportunistic exits. Moreover, a reasonable notice

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230. MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 33 (6th ed. 2007); see also, e.g., Waldock, *supra* note 141, at 52 (objecting to the idea of an opt-out right on the ground that “[e]ither there is an international legal order or there is not”).

231. See Helfer, *supra* note 1, at 1582.

232. On the views of the nineteenth-century commentators, see *supra* notes 61-76 and accompanying text.

233. This is the problem of opportunistic withdrawals. See ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS 198-99 (2008); Vincy Fon & Francesco Parisi, *Stability and Change in International Customary Law*, 17 SUP. CT. ECON. REV. 279 (2009).

period might be imposed in situations in which reliance interests are at stake. As we have discussed, that is how the issue is handled in the treaty context. For example, the Geneva Conventions of 1949, which address the treatment of various categories of individuals during wartime, are a prime candidate for opportunistic behavior.<sup>234</sup> The Conventions, however, protect against opportunistic withdrawals by allowing denunciation only after a time delay of a year or, in situations in which hostilities are ongoing, after peace has been concluded.<sup>235</sup> More generally, for treaties that allow for withdrawal by implication rather than by an express provision, the Vienna Convention on the Law of Treaties provides that the default notice period is one year.<sup>236</sup> In the treaty context, we are unaware of any sentiment among commentators that there is a problem of excessive withdrawal,<sup>237</sup> and it is not clear why CIL should operate differently in this regard.

Finally, to the extent that there are incentives to comply with international law, such as reputational considerations,<sup>238</sup> those incentives will presumably continue to exist despite a right of withdrawal.<sup>239</sup> In fact, reputational incentives to comply with international law might actually work better in a world with rights of withdrawal. As the literature on social norms has shown, reputational sanctions operate most effectively in settings where those involved engage in repeat transactions and have reliable information that enables them to distinguish “good” and “bad” types.<sup>240</sup> To facilitate such evaluations,

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234. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 63, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

235. See Helfer, *supra* note 1, at 1597 n.50. For a suggestion that states can solve the problem of opportunistic withdrawals from treaties by tailoring appropriate notice and waiting periods, see Barbara Koremenos & Allison Nau, *Exit, No Exit*, 21 DUKE J. COMP. & INT’L L. (forthcoming 2010) (on file with authors).

236. See Vienna Convention on the Law of Treaties, *supra* note 3, art. 56(2), 1155 U.N.T.S. at 345.

237. See Helfer, *supra* note 1, at 1601-06 (noting the general perception among commentators that withdrawal from treaties occurs rarely and is not an issue worthy of much study).

238. For discussion of reputational incentives to comply with international law, see Rachel Brewster, *Unpacking the State’s Reputation*, 50 HARV. INT’L L.J. 231 (2009); and Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002). For a more general discussion of theories about why nations comply with international law, see Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005).

239. See, e.g., Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT’L ECON. L. 507, 533-34 (2009) (noting the likely reputational costs associated with withdrawing from bilateral investment treaties); Helfer, *supra* note 1, at 1591.

240. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 25 (2000). The issue is “[to] distinguish a nation’s principled assertion of a right to withdraw from a relationship that has turned out

compliance with the rules of the system should send a reliable signal about whether a party is a potentially good or bad partner for the future. If the system of rules is viewed as generally effective and legitimate, then information that an individual actor has violated the rules will produce the inference that the violator is not a good type. However, if the system of rules is made of antiquated and inefficient rules that cannot be altered quickly to tackle changed circumstances, then even the good types may find it necessary to violate the rules, and violations will not produce a reliable signal of type.

The latter scenario is what is likely to happen with CIL under the Mandatory View. Absent a right of withdrawal, nations cannot change even inefficient or outdated CIL rules without either obtaining agreement from other nations or violating the rules. As a result, it is understood under the Mandatory View that a normal route for changing CIL is through violating it.<sup>241</sup> This means that violations of CIL will not necessarily signal that the violator is a bad actor. In fact, in some cases, the willingness to take the risk of being the first to violate an inefficient or outdated CIL rule may be taken by others as a positive signal about the violator. For example, the bombing of Serbia by NATO forces during the Kosovo operation was likely a violation of the international law (both treaty-based and customary) governing the use of force.<sup>242</sup> Because international rules had developed without adequate consideration of the need for an exception for humanitarian interventions to stop genocide, however, the NATO countries felt it necessary to violate the rule. As Professor Brewster observed, the reputations of the NATO countries were probably enhanced, not diminished, by their rule violation.<sup>243</sup>

As another illustration, consider again the hypothetical concerning the screening of diplomatic pouches. Under the Mandatory View, it is assumed that if a complete ban on screening pouches has become inefficient or outdated, the only way in which it can be modified is for a nation either to obtain the agreement of other nations or to violate the CIL rule and hope that other nations acquiesce. The violation of the ban on screening, under this view, does not necessarily signal that the violator is a bad actor. The reputational incentives to comply with the rule are therefore diminished. By contrast, if there were some ability to withdraw from the rule, nations would have an

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badly from an opportunistic attempt to appropriate benefits that were created for a collective good." Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1583 (1999).

241. See *supra* text accompanying note 35.

242. See, e.g., Cogan, *supra* note 36, at 190-91; Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 488 (2006).

243. See Brewster, *supra* note 238, at 240.

option other than violating the rule, and their violations would provide a more reliable signal of bad behavior. At the same time, the ability to withdraw would likely give the nation more leverage to induce other nations to negotiate a new agreement, thereby reducing potential holdup problems. The option to withdraw would also give other nations comfort in entering new agreements because they would not have to fear being stuck should the rule turn out to be inefficient.

In sum, under the Mandatory View, a violation of CIL does not inherently signal that the violator is a bad actor. This in turn diminishes the reputational incentive to comply with CIL. By contrast, if there were a right to withdraw from CIL rules, rule violations (in the absence of a withdrawal) would be more likely to be taken as a sign of bad behavior, and the reputational incentives to comply would be greater.

One might ask why, in a world with the Default View, nations would not avoid this reputational pressure to comply by simply withdrawing from a CIL rule before violating it. Part of the answer is that, to the extent that CIL rules are viewed as legitimate and beneficial, there are reputational incentives not to withdraw from them. Moreover, such withdrawals are by definition public and observable. Truly bad actors are probably more likely to attempt to violate CIL rules quietly rather than invoke a right of withdrawal, in an effort to avoid the reputational costs of withdrawal. As a result, when such violations are detected, they are more likely to constitute reliable evidence of the bad character of the actor.

In considering rule-of-law arguments for the Mandatory View, this is an appropriate place to return to an idea mentioned earlier: that CIL is less mandatory than current doctrine suggests.<sup>244</sup> The argument here is that, in light of the vague and amorphous nature of CIL, and the lack of centralized enforcement or adjudicative institutions, nations have a *de facto* ability to exit from CIL rules by contesting the rules or arguing that the rules do not cover particular fact scenarios.

While there is almost certainly some truth to this account of CIL, it works at cross-purposes with rule-of-law arguments in favor of the Mandatory View. This account comes close to suggesting that CIL is simply a form of “law talk” that does not itself constrain state behavior—a position that supporters of the Mandatory View would, we suspect, resist. In any event, the account is overbroad, in that CIL rules vary substantially in their specificity, and there are at least sometimes adjudicative or enforcement mechanisms available to apply CIL (including, for example, domestic courts). The ability of nations to engage

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<sup>244</sup> See *supra* note 33.

in de facto exit is also likely to be biased in favor of those nations that have more power and resources, including access to sophisticated lawyers.

Importantly, a system that allows for de jure as opposed to de facto exit is more consonant with rule-of-law values. Most obviously, de jure exit operates within the domain of law whereas de facto exit allows for an evasion of the law.<sup>245</sup> In addition, a system that allows de jure exit enhances information flow because this type of exit will be express and public and thus can reveal information.<sup>246</sup> By contrast, in a system that permits easy de facto exit (where de jure exit is prohibited), nations have an incentive to conceal information so that it is less likely that their actions will be perceived as a breach of the rule. In a sense, allowing nations the option of de jure exit gives the nations that would otherwise want to hide their violations an incentive to reveal information about their actions. As discussed earlier in Section IV.B, one of the mechanisms for international law enforcement is reputation, and the availability of good information is crucial for any reputation-based system to work. A system of vague laws that allows all but the most extreme violators to argue credibly that they are complying, and does not provide an incentive for the disclosure of noncomplying conduct, ends up revealing little information.<sup>247</sup>

Allowing for lawful exit rights under CIL might also enhance treaty-making. As discussed above, multilateral treaties are often invoked today as evidence of the content of CIL.<sup>248</sup> This creates an anomaly, however, whereby nations frequently have a right to exit from the underlying treaties but not from the similar CIL derived from the treaties. This anomaly in turn increases the “sovereignty costs” associated with establishing and joining multilateral

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245. Cf. Helfer, *supra* note 1, at 1587 (“Particularly given the international legal system’s relatively anarchic environment, in which surreptitious shirking of treaty commitments is often plausible, a state’s decision to follow the rules of the game, publicize a future withdrawal, and open itself to scrutiny demonstrates a kind of respect for international law.”).

246. Similarly, in the treaty context, the use of reservations and derogation clauses can enhance information flow. See, e.g., Edward T. Swaine, *Reserving*, 31 YALE J. INT’L L. 307, 335-38 (2006) (reservations); Emilie Hafner-Burton, Laurence R. Helfer & Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties* (June 9, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1622732](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622732) (derogation clauses).

247. Allowing lawful exit as an alternative to surreptitious violation may also increase the likelihood that states will be socialized toward law compliance. Cf. Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 668-69 (2004) (discussing this possibility in connection with derogation clauses in human rights treaties).

248. See *supra* text accompanying notes 40-41.

treaties.<sup>249</sup> By contrast, allowing for exit rights under CIL would reduce these costs and thereby potentially encourage more treaty-making. In addition, a nation seeking to withdraw from a CIL rule would need to announce this intention publicly, thereby potentially placing the issue on the international agenda for discussion and negotiation, something that is less likely to happen when a nation simply dissembles about its true position.

### C. Externalities and Agency Problems

Having addressed the two arguments we have found in the literature in favor of the Mandatory View, we now develop two additional arguments that offer somewhat stronger support for that View: the problem of interstate externalities and the danger that governments will be unfaithful agents for their populations. As we explain, these arguments provide support for limiting opt-out under certain circumstances, but they do not support the conclusion that all of CIL should be subject to the Mandatory View.

#### 1. Externalities

Many activities that nations engage in, such as waging war, polluting the atmosphere, manipulating their currency values, or financing international terrorism, impose externalities on others. Globalization has heightened the likelihood that one nation's actions—for example, in dealing with an internal financial crisis—can generate global effects. A chief target of international law, therefore, is conduct that generates interstate externalities. Such international law might seem to be a prime candidate for the Mandatory View, in that nations might be tempted to exit CIL rules when they are able to externalize costs of activities on others.<sup>250</sup>

As an initial matter, it is important to keep in mind that this externalities argument can at best offer only partial support for the Mandatory View. Many types of state conduct, especially conduct carried out within a nation's territory, will not necessarily produce substantial externalities. Moreover, externalities will often be sufficiently distributed or insignificant such that they will not

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<sup>249</sup> The term “sovereignty costs” refers to “the symbolic and material costs of diminished national autonomy.” Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT’L L. 361, 375 (1999); see also, e.g., Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 227 (2000) (defining “sovereignty cost” as “the surrender of national discretion”).

<sup>250</sup> See, e.g., Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529 (1993).

provide an appropriate justification for legal constraints. Basic Coasean bargaining also teaches us that, even when externalities are significant or unevenly distributed, they may not by themselves provide a justification for the Mandatory View, particularly when transaction costs are low and parties can negotiate over the externalities.<sup>251</sup> It is possible, therefore, that the best solution to some international externalities is simply to have the affected parties negotiate a solution with the externality-producing nation.

In any event, there is a broader problem with linking the Mandatory View to externalities: it assumes that the requisite state practice and *opinio juris* will develop to address situations in which nations impose nonreciprocal and substantial externalities. This assumption, however, is doubtful. Consider the international law prohibition on waging aggressive war. This prohibition was established after two horrific world wars confirmed the externalities that can be generated by this conduct. The Mandatory View thus might seem to make sense for this prohibition. Importantly, though, CIL was not viewed as an effective means of regulating the problem of aggressive war. Instead, it was regulated in the U.N. Charter, a treaty that has been ratified by essentially all nations of the world.<sup>252</sup> Further, this treaty establishes an international institution—the Security Council—that has unique authority to enforce compliance with the Charter, even through the authorization of military force against the violating nation. Alas, even the U.N. Charter framework has proven insufficient for regulating the issue, as countless wars of various scope (albeit not on a worldwide scale) have been waged since the Charter was established in 1945.

Other examples of modern externalities are consistent with this conclusion. Consider four of the most pressing problems of the day: global warming, the proliferation of small arms, financial contagion, and terrorist financing. It seems unlikely that these issues can be adequately addressed by CIL. Absent monitoring and verification systems, nations have an incentive to cheat and free ride on the efforts of others. Further, if there are enough nations that benefit from imposing externalities on others, they will resist the attempts of others to constrain them, at least absent some inducement, which itself may require collective action. This is why, in the global warming context, there has been so much effort to establish a comprehensive treaty, such as the Kyoto

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251. See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 13-14 (3d ed. 2003); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 49-52 (6th ed. 2003).

252. See U.N. Charter art. 2, para. 4.

Protocol.<sup>253</sup> In the case of financial contagion, the efforts toward setting up rules or principles of responsible sovereign behavior are only beginning to be considered by international treaty-based bodies such as the IMF, the Paris Club, the World Bank, and United Nations Conference on Trade and Development (UNCTAD).<sup>254</sup> In the case of small arms proliferation, efforts toward producing an international treaty via the United Nations have been ongoing, but slow.<sup>255</sup> Much the same story can be told regarding terrorist financing. Progress has been made not through CIL, but rather through binding resolutions of the Security Council and various treaties.<sup>256</sup> The point is that in none of these cases has CIL been able to generate effective rules to constrain misbehavior.

The academic literature on collective action problems lends support to the foregoing discussion.<sup>257</sup> For our purposes, two basic points emerge from this literature. First, collective action problems are harder to solve when groups become larger, interactions become fewer, and heterogeneity becomes greater.<sup>258</sup> Misbehavior becomes harder to detect, and enforcement via informal sanctions becomes more difficult to implement. Second, while medium-sized groups may sometimes be able to devise solutions to collective action problems, it is unlikely that such solutions will arise spontaneously out of

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253. See, e.g., DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* 203 (2010) (“[T]he elaboration of specific rules of behavior (for example, to regulate greenhouse gas emissions, hazardous materials, or trade in endangered species) has proceeded through purposive negotiations, resulting in a treaty or other type of agreed instrument.”).

254. On UNCTAD’s efforts along these lines, which involve a collaborative project with the other international organizations mentioned in the text, see Lee C. Buchheit & G. Mitu Gulati, *Responsible Sovereign Lending and Borrowing* (UNCTAD Project No. 198, Nov. 2009).

255. See Asif Efrat, *Toward Internationally Regulated Goods: Controlling the Trade in Small Arms and Light Weapons*, 64 INT’L ORG. 97, 98-100 (2010).

256. See, e.g., Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT’L L. 315 (2003).

257. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971); ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

258. See, e.g., OLSON, *supra* note 257, at 1-35 (noting that as the size of a group increases, the ability to monitor goes down and the cost of bargaining goes up); OSTROM, *supra* note 257, at 183-84 (pointing out the difficulty of solving collective action problems in large groups where “no one communicates, everyone acts independently, no attention is paid to the effects of one’s actions, and the costs of trying to change the structure of the situation are high”).



unstructured interactions.<sup>259</sup> In the international law literature, along these lines, much ink has been spilled over whether, in the absence of a leviathan, global collective action problems can be solved.<sup>260</sup> Importantly, the implicit assumption in these discussions is that multilateral treaties would have to be negotiated first, and the debate then is over whether those treaties would work to constrain state behavior in a meaningful fashion.<sup>261</sup>

The problem of externalities helps explain why some treaty regimes explicitly or implicitly restrict withdrawal. Boundary treaties provide a classic example, as they are presumed not to be subject to unilateral withdrawal.<sup>262</sup> Part of the likely explanation is the problem of reliance, discussed above, since nations will presumably take a variety of actions in reliance on an established border. But the other likely explanation is that, since intrusion on a nation's territory has long been viewed as a justification for war, the externalities associated with unilateral withdrawal are high. Importantly, however, these arguments do not apply to all treaties, and—as we have discussed—many treaty regimes in fact permit unilateral withdrawal.

## 2. Agency Problems

Another argument for limiting opt-out of CIL rules is that the interests of governments will sometimes be contrary to the interests of their populations. That is, governments will want to opt out even though it would be better for their populations if they did not.

As an initial matter, this agency argument for restricting national choice is too broad, in that it could suggest micromanaging all government decisions, or at least those made by nondemocracies. A foundational principle of international law (and sovereignty) has long been that governments are

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259. For example, in Ostrom's research on how mid-sized groups are able to solve collective action problems, she finds that successful solutions were a function of having agreements, monitoring regimes, and other institutional supports. See OSTROM, *supra* note 257, at 180. Similarly, Goldsmith and Posner suggest that customary law might help solve coordination problems, but that treaties are likely necessary to solve collective action problems. GOLDSMITH & POSNER, *supra* note 15, at 35-38.

260. See, e.g., ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* (2006).

261. Cf. Norman & Trachtman, *supra* note 208 (arguing that CIL, under certain conditions, can evolve to solve collective action problems).

262. See AUST, *supra* note 3, at 290, 299.

allowed to make even bad decisions across a wide array of issue areas.<sup>263</sup> If a government decides to adopt a planned rather than free market economy or to stay out of a free trade treaty regime, international law will have nothing to say, even though the decision, in hindsight, may turn out to be detrimental to the well-being of the population.

There may be situations, however, in which we can be confident, *ex ante*, that the interests of governments and populations will diverge, and where the moral considerations are so strong that they override the usual deference to national governments. Much of international human rights law might be thought of in these terms, in that it seeks to protect populations against abusive or discriminatory actions of their own governments. An illustration of this rationale is the position of the U.N. Human Rights Committee that nations do not have the right to withdraw unilaterally from the International Covenant on Civil and Political Rights.<sup>264</sup> After North Korea announced in 1997 that it was withdrawing from the Covenant, the Committee issued a General Comment concluding that there is no withdrawal right under the Covenant because, among other things, “[t]he rights enshrined in the Covenant belong to the people living in the territory of the State party” and therefore the protection of the Covenant “devolves with territory and continues to belong to them, notwithstanding change in government of the State party.”<sup>265</sup>

Assuming this reasoning is persuasive, it is limited to international law that is focused on certain fundamental rights of individuals (such as *jus cogens* norms), rather than on more traditional interstate issues. While human rights law has become an important component of modern international law, it is only one component, and the extent to which it is governed by CIL rather than by treaty is the subject of debate.<sup>266</sup> Thus, by itself, this agency problem does not explain the Mandatory View, which purports to describe all of CIL. As noted above, the mere fact that a decision affects the welfare of a population has not typically been thought to be a sufficient reason to disable government

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263. See, e.g., HENKIN, *supra* note 45, at 12 & n.\* (noting that “[f]or centuries what transpired between a state and its inhabitants, as once between prince and subject, was no other state’s business,” and that, despite the modern rise of international human rights law, “impermeability is still a general characteristic of statehood”).

264. For a discussion, see Elizabeth Evatt, *Democratic People’s Republic of Korea and the ICCPR: Denunciation as an Exercise of the Right of Self-Defence?*, AUSTL. J. HUM. RTS., Jan. 1999, at 215, 219–20.

265. Human Rts. Comm., Gen. Comment on Issues Relating to the Continuity of Obligations to the Int’l Covenant on Civil & Pol. Rts., ¶ 4, CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997); CCPR Gen. Comment No. 26, Human Rts. Committee, 61st Sess., U.N. Doc. A153140 (VII) (Dec. 8, 1997), available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

266. See, e.g., Simma & Alston, *supra* note 24.

control over the decision. Moreover, many treaties relate to the welfare of populations but nevertheless expressly or implicitly permit withdrawal.

It is also worth noting that there is little reason to believe that the Mandatory View was developed to address agency problems. As discussed earlier in the Article, although we cannot pinpoint the precise time at which the Mandatory View became entrenched, it had likely become the prevailing view among commentators by the early portion of the twentieth century. By contrast, the view that international law had much to say about the internal governance of states, and particularly issues of basic human rights, did not gain traction until at least the middle of the twentieth century, after the horrors of World War II.<sup>267</sup> It is unlikely, therefore, that perceptions of the agency problem were driving the emergence of the Mandatory View of CIL.

#### *D. Penalty Default*

In Part IV, we discussed some of the inefficiencies that are likely associated with the Mandatory View. It might be argued that these inefficiencies actually provide a reason for adhering to the Mandatory View—namely, that when they are combined with the disallowance of unilateral opt-out, these inefficiencies give states an incentive to negotiate treaties to override CIL. Such treaty-making should be encouraged, the argument might go, because it will result in more clearly defined obligations that are better tailored to state preferences and better able to address collective action problems. This argument envisions the Mandatory View as what is called in contract theory a “penalty default.”<sup>268</sup> A penalty default is “purposefully set at what the parties would not want,”<sup>269</sup> in order to encourage the parties to act in a socially optimal fashion.<sup>270</sup>

There are a number of problems with this penalty-default conception of the Mandatory View. Most significantly, penalty defaults work only when the cost of contracting around them is less than the cost of sticking with the default.<sup>271</sup> Negotiating treaties, particularly multilateral ones, is often expensive, time-consuming, and sometimes simply not feasible due to heterogeneous state

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267. See, e.g., BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 36 (2009) (“The most striking fact about the international law of human rights is its nearly complete absence prior to the end of World War II.”).

268. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87 (1989).

269. *Id.* at 91.

270. See *id.* at 92-95.

271. See *id.* at 93.

preferences. Indeed, this is one of the central arguments for retaining CIL today as an independent body of international law.<sup>272</sup> Moreover, because of the time needed to negotiate treaties, the benefits often accrue to later governments rather than to the government that does the hard work of developing the treaty. Individual governments, therefore, often have an incentive to adhere to inefficient custom, even though it would be better for the system (and this nation, in the long run) to negotiate treaties. In these circumstances, the high cost of movement out of the status quo acts as a trap, which is the opposite of what a penalty default aims to achieve.

In addition, the Mandatory View applies across the board to all issues of CIL. Penalty defaults, however, are used only rarely and selectively in areas of domestic law. Indeed, some commentators argue that there are few or no real penalty defaults, and no one asserts that there is a widespread use of them.<sup>273</sup> Instead, most default rules are “majoritarian” in that they generally try to come close to what the parties would have agreed to if they had bargained over the issue.<sup>274</sup> It is unlikely, therefore, that the use of a penalty default can be justified across an entire system of law, such as CIL, that covers a broad and diverse range of issues.

An alternate form of the penalty argument might be that the prospect of restricted opt-out rights forces nations and publicists to be extremely careful, *ex ante*, both in proposing new forms of CIL and in policing the proposals made by others. Absent the penalty, an excess of proposals for new CIL rules might emerge and the incentives to police them might be diminished. This is a legitimate concern, but, as explained in Part I, the problem of excessive claims about CIL probably already exists as a result of the uncertainties surrounding CIL formation, in which case exit rights would work to alleviate a current problem. On the other hand, if one thought that CIL is sufficiently restrained today by its doctrinal requirements (sufficient state practice, *opinio juris*, etc.), then it is not clear why these doctrinal restraints would no longer work if there were some withdrawal rights. In any event, for reasons discussed above, increasing CIL innovation might actually be a positive development, since there are reasons to believe that CIL currently has difficulty addressing modern international problems.

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272. See *supra* text accompanying notes 20–21.

273. See, e.g., Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563 (2006); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 594–609 (2003) (suggesting that, for contracts among sophisticated parties, there are few default rules in practice, let alone ones that have universal application).

274. See Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589, 597 (2006).

*E. Differences Between Treaties and CIL*

This Article began by comparing the withdrawal rights under treaties and CIL. A defender of the Mandatory View might note that there are differences between these two types of international law. While this is obviously true, the ultimate question is whether those differences explain the differential withdrawal rights.

One potentially relevant difference between treaties and CIL is that some treaties involve a package of rules bundled together, such that a nation may be forced to give up the entire package as a cost of withdrawal. CIL, by contrast, consists of discrete rules. As a result, the argument might go, it will not be as costly for nations to exit from CIL, and this will create a danger of excessive withdrawals.

As explained above, there are a variety of reasons to conclude that the concern about excessive withdrawals is overstated, and only one of these reasons concerns the analogy to treaties. In any event, treaties vary substantially in the extent to which they involve a package of rules. To take one example, in 2005 the United States withdrew from the Optional Protocol to the Vienna Convention on Consular Relations, a treaty that has essentially only one rule—consent to the exercise of jurisdiction by the International Court of Justice over a certain category of cases.<sup>275</sup> Moreover, we are unaware of evidence suggesting that the withdrawal rights in treaties differ as a function of the extent to which they contain a package of rules.

The package-oriented treaties also present less of an “either/or” choice than one might assume. For example, nations are frequently allowed to attach reservations to their ratification of treaties and thereby accept only part of the package.<sup>276</sup> In theory, nations might even have the ability to withdraw from a treaty and then reenter the treaty regime with a new set of reservations, although this idea is controversial.<sup>277</sup> In addition, some package-oriented treaties also contain mini-opt-out rights or “safety valves” that allow a nation to stay within the treaty regime while opting out of particular provisions. One example is the derogation provision found in some human rights treaties that allows nations to avoid being bound by certain restrictions in the treaty during

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275. See Frederic L. Kirgis, Addendum to ASIL Insight, *President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights*, ASIL INSIGHTS (Mar. 2005), <http://www.asil.org/insightso50309a.cfm>.

276. See Vienna Convention on the Law of Treaties, *supra* note 3, art. 19, 1155 U.N.T.S. at 336-37; *supra* note 164 and accompanying text.

277. See AUST, *supra* note 3, at 159-60; Laurence R. Helfer, *Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 YALE J. INT'L L. 367, 371-72 (2006).

times of emergency.<sup>278</sup> A further example is Article XIX of the General Agreement on Tariffs and Trade, which allows nations to suspend trade obligations with respect to a product when, as a result of unforeseen developments, “any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products.”<sup>279</sup>

Another potentially relevant difference between treaties and CIL is that treaties are negotiated and usually written down. That process allows careful construction of tailored withdrawal provisions. CIL, by contrast, arises out of a more amorphous process, with the aggregation of state practice and *opinio juris* over time. As a result, it could be argued, there will inherently be less clarity in withdrawal rights for CIL than for treaties.

As an initial matter, it should be recalled that some treaty withdrawal rights are implicit rather than explicit.<sup>280</sup> In any event, the argument that it is better to have issues like this one regulated through express treaty provisions proves too much, since it would indict *all* of the secondary rules governing the formation and application of CIL, including the persistent objector doctrine. Nevertheless, there may be a need to craft limitations and variations on CIL withdrawal rights. These limitations and variations might be drawn from treaties that address the same subject matter as the CIL rule (such as a particular notice period), or interpreters could rely on a standards-based approach that (as with certain other areas of international law) considers what is reasonable under the circumstances.<sup>281</sup> As with all developments in CIL, these refinements could be promoted through a variety of channels, including national pronouncements and international adjudication.

Furthermore, the vagueness of CIL withdrawal rights might produce benefits. In particular, a nation seeking to exit from a CIL rule would need to announce not only the fact of exit, but also the rule from which it was exiting.

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278. See, e.g., International Covenant on Civil and Political Rights, art. 4(1), Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171.

279. General Agreement on Tariffs and Trade, art. XIX, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194; see also, e.g., Alan O. Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 U. CHI. L. REV. 255, 256 (1991) (“Article XIX is also often termed the GATT ‘escape clause,’ as it allows signatories to ‘escape’ from their GATT commitments.”).

280. See *supra* note 3 and accompanying text.

281. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. 392, 419-20 (Nov. 26) (requiring reasonable notice prior to withdrawal from compulsory jurisdiction of the International Court of Justice and also applying a six months’ notice provision contained in the U.S. consent to jurisdiction).

In doing so, nations would clarify their views about the content of CIL and probably also the reasons why they did not want to continue operating under the particular rule. Such clarification might be particularly useful given the many uncertainties that surround the process of CIL formation, as discussed in Part I.

Another potential distinction between treaties and CIL is that allowing withdrawal rights under CIL might create greater gaps in the law than would withdrawal rights under treaties. The argument would be that, under the Mandatory View of CIL, when a nation withdraws from a treaty, it is still potentially subject to background rules of CIL from which it cannot withdraw. Indeed, some treaties contain clauses specifically noting this fact, and it is stated as a more general proposition in the Vienna Convention on the Law of Treaties.<sup>282</sup> If a nation could also exit from CIL, however, this might create complete gaps in international law.

In fact, international law is far from a seamless web, and it is not uncommon to have gaps. As Professor Bodansky notes, “[O]ften, states differ and no rule gains acceptance one way or the other.”<sup>283</sup> Many treaties are thus viewed as establishing international law that did not previously exist. Moreover, as illustrated by the Permanent Court of International Justice’s decision in the *Lotus* case, when a CIL norm does not restrict a nation’s actions, there is not a gap in the law but rather a background rule that allows for freedom of action.<sup>284</sup> It is not self-evident that such freedom of action will always be bad for the international system. In situations in which it is problematic to allow for such freedom of action, one might expect that nations will have a strong incentive to develop a treaty to address the issue. Allowing withdrawal rights under CIL might increase the incentive for such treaty

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282. See Vienna Convention on the Law of Treaties, *supra* note 3, art. 43, 1155 U.N.T.S. at 342 (stating that withdrawal from a treaty “shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty”).

283. Daniel Bodansky, *Non Liqueur and the Incompleteness of International Law*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* 153, 164-65 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

284. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 9, at 19 (Sept. 7) (“Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”); see also MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* 63 (2001) (“International law has a doctrine that addresses legal uncertainty—a rule for no rules. It derives from the famed *Lotus Case*, and it is called the ‘freedom principle.’”).

negotiation, since it will be less likely that nations will muddle along with a less-than-ideal CIL rule.

Finally, in addition to these specific differences, one might argue that CIL and treaties rest on different theoretical foundations. For example, the argument might be that CIL does not rest on the same assumptions about the need for state consent, or (relatedly) that CIL is more akin to mandatory domestic public law (such as criminal law) than to voluntary contracts. The problem with this argument is that it does not by itself explain *why* CIL and treaties are different in this respect, or whether this difference justifies the Mandatory View. Rather, this argument simply invites the question that we have been addressing in the last two Parts of the Article, which is whether it is desirable for CIL to have an exit regime that is significantly more mandatory than treaty law. In any event, there are some obvious differences between CIL and mandatory domestic public law, most notably the lack of a central sovereign with authority to develop and apply the rules of CIL.<sup>285</sup>

#### *F. Developing a Typology*

While this Article has made the functional case for expanding the opportunities for states to opt out of existing CIL, it has not attempted to develop a typology that would match more or less permissive opt-out rules to particular areas of CIL—something that would require a separate project. Our analysis does suggest, however, some general guidelines that would be relevant in developing such a typology. Consistent with a recurring theme of the Article, such a typology might consider patterns in treaty withdrawal clauses, which provide direct evidence of state preferences regarding the propriety of opt-out provisions. In addition, our analysis suggests that a typology should take account of the functional cooperation problems that different areas of CIL attempt to solve, some of which are likely to require more mandatory regimes than others. For example, areas of CIL that address significant agency problems, such as *jus cogens* norms of human rights, are likely to be prime candidates for the Mandatory View. By contrast, areas of CIL where externalities are low and prewithdrawal notice adequately addresses concerns about reliance, such as with respect to certain immunity doctrines, might be prime candidates for expansive opt-out rights.

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<sup>285</sup>. We discuss additional reasons to question the analogy between CIL and mandatory domestic public law in Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT'L L. (forthcoming 2010) (on file with authors).



It probably also makes sense to treat certain structural or background principles as mandatory. In the treaty area, for example, there is no right of opt-out of the *pacta sunt servanda* principle, whereby nations are required to comply with treaty obligations in good faith (subject to whatever withdrawal rights are available under the treaty).<sup>286</sup> Similarly, even under a Default View of CIL, there might often be a requirement of notice, and there would not be a right to opt out of that requirement. More generally, some aspects of international law, such as the concept of a nation-state, may have a “constitutional” character that depends on a more mandatory approach, because those aspects are necessary in order for the system to operate. As Professor Henkin has noted, however, “Such inter-state constitutional law is not ‘customary law’ in any meaningful sense relevant to an appreciation and understanding of the ‘sources’ of international law today.”<sup>287</sup> Perhaps similar systemic arguments can be made for restricting exit from foundational organizations such as the United Nations.<sup>288</sup> These arguments, however, would not apply to the vast bulk of CIL rules that simply regulate particular substantive issues.

Importantly, such a typology might involve making certain CIL rules *more* mandatory than under the current one-size-fits-all approach to withdrawal. Under the Mandatory View, nations may avoid becoming bound by any CIL rule before it forms through persistent objection, and they may override any CIL rule between themselves by entering into a treaty. By contrast, under a system in which the exit rules were linked to the functions of the particular type of CIL, rules aimed at solving agency or externality problems might not allow for opt-outs via either the persistent objector doctrine or through individual treaties with other nations. Imagine, for example, a CIL rule against the use of a certain type of industrial chemical that caused significant harm to the atmosphere. Because such a rule would be designed to protect against externalities, it might make sense to disallow opt-out even through persistent

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<sup>286</sup> See, e.g., Vienna Convention on the Law of Treaties, *supra* note 3, art. 26., 1155 U.N.T.S. at 339 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”). By analogy, in contract and corporate law, some commentators argue that fiduciary duties and principles of good faith should be mandatory. See, e.g., Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67 (2005).

<sup>287</sup> HENKIN, *supra* note 45, at 32.

<sup>288</sup> For discussion of whether there is a right to withdraw from the United Nations, see FREDERIC L. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 239-46 (2d ed. 1993). For an argument that severe restrictions on exit may be needed in federal republics to prevent them from unraveling, see Jenna Bednar, *Valuing Exit Options*, 37 PUBLIUS 190 (2007).

objection or side agreements.<sup>289</sup> As a result, a functional approach to exit rules, while making exit from CIL easier in some instances, might also make it more difficult in other cases.

## CONCLUSION

As we made clear at the outset, this Article's goal is not to challenge CIL's legitimacy but rather to better understand it. Consistent with that goal, we are writing primarily for scholars and students of international law, both in the United States and around the world. Our hope is to begin a discussion about why the Mandatory View developed and whether, for some categories of CIL, a Default View might be more appropriate.

While there are many puzzling features of CIL, its blanket disallowance of any subsequent opt-out right is particularly striking in light of the widespread withdrawal rights available under treaty law. This feature becomes more remarkable considering the substantial overlap today between treaties and CIL, both in terms of the subjects that they regulate and in terms of the content of their rules. The intellectual history of CIL further complicates the picture by showing that many prominent international law publicists in the eighteenth and nineteenth centuries thought that at least some rules of CIL allowed for a subsequent opt-out, a fact that is not mentioned in any of the current casebooks or treatises on international law. We have presented this history not out of any nostalgia for the international law of the eighteenth and nineteenth centuries, but to show that the Mandatory View, which has its own problematic history, is not the only way to think about CIL. Moreover, while the Mandatory View became conventional wisdom among commentators in the twentieth century, both state practice and the development of the persistent objector doctrine raise questions about the extent to which that View has become a settled feature of international relations. In light of the Mandatory View's complicated historical foundations, it is particularly appropriate to consider the extent to which this View is functionally justified. Although it is possible to formulate functional arguments for restricting opt-out rights under CIL, it is difficult to conclude from these arguments that such restrictions should apply across the board to all of CIL, especially in light of the inefficiencies that such a mandatory regime is likely to generate.

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<sup>289</sup> For an argument along these lines, see Charney, *supra* note 250.